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## Protectable "Art": Urinals, Bananas, and Shredders

Richard H. Chused

# Protectable “Art”: Urinals, Bananas, and Shredders

Richard Chused\*

*Creative souls have long played with our imaginations, as well as our tastes, about what art may be. The resulting absurdist, dada, and everyday object art forces us to step back and ask a few intellectual property questions about what this art has done, undone, or reconstructed in the copyright world. The Copyright Act grants protection to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” This Article explores how pranksterism, eccentricity, repackaging of ordinary objects, and decay can be subsumed within legal categories of copyright law like originality, fixation, protectable two- or three-dimensional art, and moral rights.*

*Taking concepts from the history of art, from modern notions of visual perception, and from recent developments in the understanding of random motion, this Article unravels copyright conundrums involving artistic use of everyday objects. Three artists are highlighted: Marcel Duchamp, who created art by placing a urinal on a pedestal; Maurizio Cattelan, who recently hung slowly decaying bananas at an exhibition; and Banksy, who inserted a shredder in a composition’s frame and activated it at an auction.*

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*Comparing the work of these three provocative artists with a variety of other well-known creative souls leads to the conclusion that Duchamp’s urinal, Cattelan’s creation of instructions for taping a banana to a wall, and Banksy’s integration of a shredder into the frame of a two-dimensional work are fully protected as copyrightable works.*

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INTRODUCTION

During the last century and the early decades of our present era, the art world exploded in fanciful and wonderful ways. Three memorable examples make this point: Marcel Duchamp’s *The Fountain*—a urinal set atop a pedestal;<sup>1</sup> Maurizio Cattelan’s banana caper *The Comedian*—a banana attached to a gallery wall with duct tape (that later was removed and eaten by the mischievous David Datuna);<sup>2</sup> and Banksy’s shredding prank at a Sotheby’s auction in

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<sup>1</sup> The famous *Fountain* is typically attributed to Marcel Duchamp. However, the idea may have belonged to a woman named Baroness Elsa von Freytag-Loringhoven. See Siri Hustvedt, *A Woman in the Men’s Room: When Will the Art World Recognise the Real Artist Behind Duchamp’s Fountain?*, THE GUARDIAN (Mar. 19, 2019), <https://www.theguardian.com/books/2019/mar/29/marcel-duchamp-fountain-women-art-history> [<https://perma.cc/XG43-UXG9>]. There certainly is contrary, or at least doubtful, commentary on the matter as well. See *The Fascinating Tale of Marcel Duchamp’s Fountain*, PHAIDON (May 26, 2016), <https://www.phaidon.com/agenda/art/articles/2016/may/26/the-fascinating-tale-of-marcel-duchamps-fountain/> [<https://perma.cc/DQ8D-433D>].

<sup>2</sup> Robin Pogrebin, *Banana Splits: Spoiled by Its Own Success, the \$120,000 Fruit Is Gone*, N.Y. TIMES (Dec. 8, 2019), <https://www.nytimes.com/2019/12/08/arts/design/banana-removed-art-basel.html> [<https://perma.cc/79XZ-KCE9>]; Jason Farago, *A*

2018—a shredder installed in the frame of a two-dimensional work and surreptitiously activated at an auction of the work.<sup>3</sup>

Creative souls have long played with our imaginations, if not our tastes, about what art may be. The resulting absurdist, dada, and everyday object art forces us to step back and ask a few intellectual property questions about what this art has done, undone, or reconstructed in the copyright world. The Copyright Act grants protection to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>4</sup> This Article explores how pranksterism,<sup>5</sup> eccentricity, repackaging of ordinary objects, and decay can be subsumed within legal categories—such as originality, fixation, protectable two- or three-dimensional art, and moral rights—of the Copyright Act.<sup>6</sup>

By way of introduction, consider an event much less widely heralded as art than the works of Duchamp, Cattelan, and Banksy. In 2016, two visiting teenagers found the art on display at the San

(*Grudging*) *Defense of the \$120,000 Banana*, N.Y. TIMES (Dec. 8, 2019), <https://www.nytimes.com/2019/12/08/arts/design/a-critics-defense-of-cattelan-banana.html> [<https://perma.cc/CN32-AZGZ>]. Cattelan also hit the front pages after installing a solid gold, functioning toilet in one of the restrooms at the Solomon R. Guggenheim Museum in New York City. *America* by Maurizio Cattelan, available at GUGGENHEIM MUSEUM, <https://www.guggenheim.org/exhibition/maurizio-cattelan-america> [<https://perma.cc/9QQ3-MQBQ>]. The toilet was later moved to the Blenheim Palace, the birthplace of Winston Churchill, in Woodstock, Oxfordshire, England, and was apparently stolen on September 14, 2019. Alex Marshall, *What Happened to the Stolen Gold Toilet?*, N.Y. TIMES (Nov. 20, 2019), <https://www.nytimes.com/2019/11/20/arts/design/gold-toilet-america.html> [<https://perma.cc/G3EN-CUBE>].

<sup>3</sup> Scott Reyburn, *Banksy Painting Self-Destructs After Fetching \$1.4 Million at Sotheby's*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/arts/design/uk-banksy-painting-sothebys.html> [<https://perma.cc/3CGB-385C>]; Scott Reyburn, *How Banksy's Prank Might Boost His Prices: 'It's a Part of Art History'*, N.Y. TIMES (Oct. 7, 2018), <https://www.nytimes.com/2018/10/07/arts/design/banksy-artwork-painting.html> [<https://perma.cc/K9PL-ZWDF>].

<sup>4</sup> Copyright Act of 1976, 17 U.S.C. § 102.

<sup>5</sup> For an interesting commentary on Banksy, art, and pranksterism, see Anna Tichy, *Banksy: Artist, Prankster, or Both?*, 64 N.Y.L. SCH. L. REV. (forthcoming 2020).

<sup>6</sup> Copyright protection exists in original works of authorship fixed in a tangible medium of expression. 17 U.S.C. § 102. Authors gain protection against infringers for two- and three-dimensional works of art, and many of them also obtain moral rights to prevent the mutilation or destruction of their works. 17 U.S.C. §§ 101, 106A.

Francisco Museum of Modern Art<sup>7</sup> to be simple minded. They decided to emulate that simplicity by placing a pair of eyeglasses on the floor directly beneath other artwork hanging on the wall.<sup>8</sup> The move generated a surprising variety of responses from visitors—as shown in a few of the photos displayed by the teenagers, Kevin Nguyen and TJ Khayatan—and on Twitter.<sup>9</sup> A number of the social network's users found this episode more amusing than creative after the pictures circulated on the Internet.<sup>10</sup> Two of the images are shown below.



Although this event certainly had a humorous side, it raised important legal questions. What, for example, is the legal status of the spectacles on the floor? Placing the eyeglasses on the floor

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<sup>7</sup> Christopher Mele, *Is It Art? Eyeglasses on Museum Floor Began as Teenagers' Prank*, N.Y. TIMES (May 30, 2016), <https://www.nytimes.com/2016/05/31/arts/sfinoma-glasses-prank.html> [<https://perma.cc/9SHR-MNSS>].

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* Others not shown here also are available online.

<sup>10</sup> *Id.*

certainly was an original gesture. But many may not consider this original for copyright purposes because the teenagers did not add anything new to or alter the spectacles themselves.

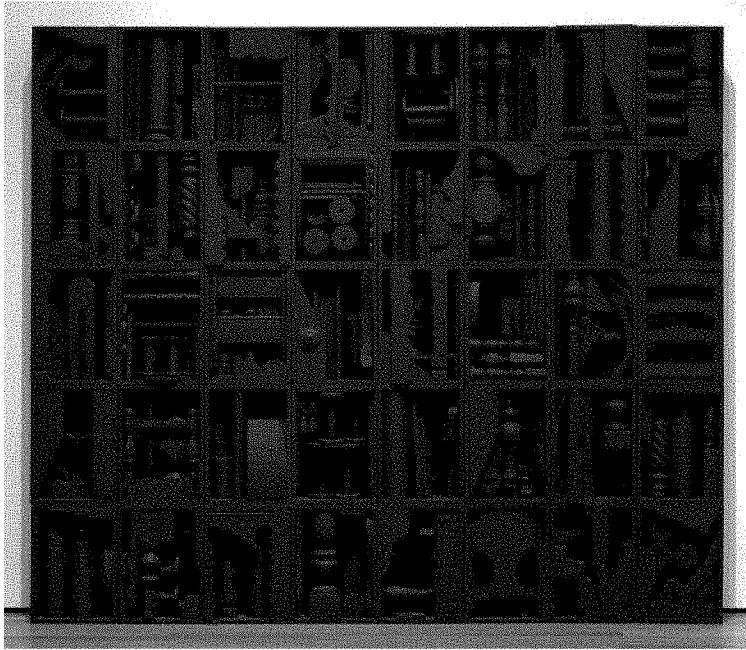
While I find the gesture delightfully original, it takes a bit of work to reach that conclusion under the copyright statute. The spectacles were fixed in a tangible medium of expression, but the artists had little if anything to do with creating or fixing the object of attention—the eyeglasses. Perhaps, therefore, they did not express anything. Ultimately, I conclude that the spectacles were both fixed and expressive, though as with originality, reaching that conclusion is not straightforward. There are complex questions about whether the placement of the eyeglasses was a work of two- or three-dimensional artistic expression within the meaning of the Copyright Act. Furthermore, what would have happened if someone had stomped on the glasses and smashed them to smithereens? The teenager whose spectacles were ruined certainly would have had a viable tort claim for damage to his property. But would they be able to bring intellectual property claims as well for mutilation or destruction of a work of visual art?<sup>11</sup> This Article explores eyeglasses and other memorable artistic moments using several prominent and some lesser known examples.<sup>12</sup>

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<sup>11</sup> See 17 U.S.C. § 106A.

<sup>12</sup> The analysis proceeds entirely under the Copyright Act of 1976, even though a number of the artworks discussed here appeared before that act went into effect on January 1, 1978. The new act completely reconstructed critical components of copyright law. For example, a work is now considered “created” at the moment of fixation rather than at the moment of publication with notice, and the requirements for a copyright to exist have generally been altered. See generally 17 U.S.C. § 101. These changes mean that it makes little sense to reconsider the artworks in this article under statutory terms that largely went into the dustbin of history about half a century ago. That approach obviously fudges the analysis, but the goal of this Note is to think about the flexibility and malleability of the extant code, and to wonder about where the present rules may allow us to venture.

## I. ORIGINALITY: URINALS

Louise Nevelson, *Big Black* (1963)

Let's begin with the sculptural work of Louise Nevelson, known for arranging standard and decorative wood pieces into truly original works.<sup>13</sup> Many of the objects she placed in her works were useful during their initial manufacture or incorporation into building construction projects. Nevelson found or acquired them, cut some of them into pieces, and converted them into parts of unusual sculptural works.<sup>14</sup> Despite the nondescript, useful nature of many of the pieces when they were at lumber yards, ornament stores, construction sites, or salvage lots, Nevelson's artistic vision allowed them to be assembled in a wholly new, creative, and original way.<sup>15</sup>

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<sup>13</sup> See Louis Nevelson, *Big Black*, available at MUSEUM OF MOD. ART., <https://www.moma.org/collection/works/81177> [<https://perma.cc/9FLZ-FPQ7>]; see also Louis Nevelson, ART STORY, <https://www.theartstory.org/artist/nevelson-louise/> [<https://perma.cc/M7SV-RKSG>].

<sup>14</sup> See Louis Nevelson, *supra* note 1313.

<sup>15</sup> *Id.*

While she worked within the twentieth century movement—made famous by Duchamp’s use of ordinary, everyday objects for artistic purposes—her intention from the outset was to strip the pieces of any useful pretense and reconfigure them into a form recognized as artistic by many, if not all, viewers.<sup>16</sup> Nevelson turned discernably ordinary items used daily by carpenters and furniture makers into aesthetic constructs, rather than setting them up as standalone objects for placement in galleries or museums.<sup>17</sup> By altering and assembling them into compositions lacking any pretense of utility, she simply used everyday objects as compositional elements.<sup>18</sup>

The assemblage qualities of Nevelson’s works point to the nub of the copyright problems surrounding Duchamp’s use of a standalone urinal as an artistic subject. Ordinary objects, like those used by Nevelson, are clearly part of a newly composed original work. But everyday articles totally visible in their ordinary, standard configurations may not be original copyrightable works if they do not qualify on their own as a sculpture.<sup>19</sup> These articles seem to be simply discernible and practically available for use in everyday life.

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<sup>16</sup> *See id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> If useful items have aspects that may be separated from their utility, then the pieces may qualify as sculpture. *See* 17 U.S.C. § 101. The statute defines a sculptural works as follows:

“[T]hree-dimensional works of fine, graphic, and applied art...art reproductions...globes... [and] models...Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a...sculptural work only if, and only to the extent that, such design incorporates...sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.” *Id.*





Marcel Duchamp, *Fountain* (1917)<sup>20</sup>

Does this same conclusion govern the state of intellectual property rights in Duchamp's *Fountain*? Did anything change dramatically when the urinal was placed on a stand and put in a photograph studio for others to "admire" as an object of art in its own right? In contrast to Nevelson, Duchamp changed the object in apparently minor and perhaps mundane ways.<sup>21</sup> The only easily discernible and major change was the urinal's location.

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<sup>20</sup> This image is the now famous photograph of the *original* version of *The Fountain*, taken by Alfred Stieglitz in 1917. *Marcel Duchamp Fountain* by Alfred Stieglitz, available at WIKIPEDIA, [https://en.wikipedia.org/wiki/Fountain\\_\(Duchamp\)#/media/File:Marcel\\_Duchamp,\\_1917,\\_Fountain,\\_photograph\\_by\\_Alfred\\_Stieglitz.jpg](https://en.wikipedia.org/wiki/Fountain_(Duchamp)#/media/File:Marcel_Duchamp,_1917,_Fountain,_photograph_by_Alfred_Stieglitz.jpg) [<https://perma.cc/JEW3-AP2R>]. This version of the piece dropped out of sight shortly after this picture was taken and has not been seen since. See *Fountain* by Marcel Duchamp, available at TATE MUSEUM, <https://www.tate.org.uk/art/artworks/duchamp-fountain-t07573> [[perma.cc/28EE-QKRP](https://perma.cc/28EE-QKRP)]. A number of replicas have been made and are now housed at major museums. *Id.*

<sup>21</sup> However, as will be seen shortly, those apparently minor alterations of the urinal may be quite meaningful and significant. See *infra* p. 182.

Are there any important intellectual property differences between a urinal on a warehouse storage shelf waiting for a buyer, one that is installed and in use in a standard bathroom location, or one on an art gallery pedestal?<sup>22</sup> If the intention of the person making such a move to a gallery was to morph the object into a “design” or a “sculpture” for viewing and contemplation rather than mere presentation of an object of complete utility, were there legal consequences?

Compare the urinal to the eyeglasses on the floor of the San Francisco Museum of Art. The same questions may be posed there. At times, spectacles speak with a utilitarian voice—as when placed on the head of a person needing eye corrections or in a display case at an optometrist’s emporium. But the voice surely changes when they are placed in a solitary fashion on a museum floor underneath a painting or other artwork. Given the intentions of the young men who deployed the spectacles, the glasses then became an aesthetic project.

But now, you say, how can kids messing around in a museum be artistic? Think twice. We all know of “one-hit-wonders” in the pop

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<sup>22</sup> One could ask identical questions about other works of Duchamp or other artists using everyday objects. Two years before *The Fountain* was created in 1915, Duchamp also “made” *In Advance of the Broken Arm*—simply a snow shovel he hung in his studio. See *In Advance of the Broken Arm*, in MUSEUM OF MOD. ART, <https://www.moma.org/collection/works/105050> [<https://perma.cc/ST2R-NJR5>] [Hereinafter *Broken Arm*]. The original, like the first urinal, is lost, but it has been replicated. *Id.* One copy is at the Museum of Modern Art. *Id.* This is the museum’s description of the piece:

Beginning in 1913 Duchamp challenged accepted artistic standards by selecting mass-produced, functional objects from everyday life and designating them as works of art. These sculptures, which he called “readymades” were aimed at subverting traditional notions of skill, uniqueness, and beauty, boldly declaring that an artist could create simply by making choices. Duchamp purchased the first version of this work in a hardware store in 1915, signed and dated the shovel, and hung it on display from his studio ceiling. Its title, *In Advance of the Broken Arm*, playfully alludes to the objects intended purpose.

*Id.*; see also Marcel Duchamp, *In Advance of the Broken Arm* or *Shovel*, in TOUS-FAIT, [https://www.toutfait.com/unmaking\\_the\\_museum/Shovel.html](https://www.toutfait.com/unmaking_the_museum/Shovel.html) [<https://perma.cc/G243-EGB8>].

music world.<sup>23</sup> Surely that can happen in the art world as well—even when just spectacles are involved. It's called inspiration. We can't explain it, but we know it's real. One of the most famous works in the world of American art is Grant Wood's *American Gothic*. He created other paintings, but this is by far the most memorable.<sup>24</sup> Or perhaps Maya Lin's Vietnam Memorial better fits the bill.<sup>25</sup> Lin never completed any noteworthy works before winning the commission.<sup>26</sup> It was pure inspiration arising from a student project on funereal architecture that led to her opportunity.<sup>27</sup> It shocked the architecture world when it was announced that a student crafted the winning design, as hundreds of other architects, including many very well-known practitioners, were bested.<sup>28</sup>

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<sup>23</sup> There are many online lists of the best hit songs by a singer or group that never made another popular tune. See, e.g., Gabbi Shaw, *The 57 Best One-Hit Wonders of All Time*, INSIDER (Feb. 24, 2020), <https://www.insider.com/best-one-hit-wonders-2018-5> [<https://perma.cc/UTQ8-QWXF>].

<sup>24</sup> *American Gothic* is in the collection of the Art Institute of Chicago. See Grant Wood, *American Gothic*, at ART INST. CHI., <https://www.artic.edu/artworks/6565/american-gothic> [<https://perma.cc/TKP4-C5WZ>].

<sup>25</sup> Christopher Klein, *The Remarkable Story of Maya Lin's Vietnam Veterans Memorial*, BIOGRAPHY (May 14, 2020), <https://www.biography.com/news/maya-lin-vietnam-veterans-memorial> [<https://perma.cc/HD6F-KU72>].

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See *Student Wins War Memorial Contest*, N.Y. TIMES (May 7, 1981), <https://www.nytimes.com/1981/05/07/us/student-wins-war-memorial-contest.html> [<https://perma.cc/7SYR-563V>].



Claes Oldenburg, *Typewriter Eraser* (1976)

In each of the three urinal settings—warehouse, restroom, and gallery pedestal—the object itself was the same. In that regard, it is quite different from Claes Oldenburg's standalone emulations of everyday objects, such as the eraser pictured above.<sup>29</sup> Oldenburg did not cut objects like Nevelson or move commercially purchased objects to a potentially significant place. Instead he made large, oversized mockups of manufactured items and often placed them in visible locations for public viewing.<sup>30</sup> They became humorous and outrageous. These creations represented a substantial change in appearance and scale. By fashioning the eraser,<sup>31</sup> Oldenburg created

<sup>29</sup> See Oldenburg's 'Typewriter Eraser' Sculpture on Display, LIVEAUCTIONEERS (Mar. 27, 2013), <https://www.liveauctioneers.com/news/top-news/art-design/oldenburgs-type-writer-eraser-sculpture-on-display-in-ny/> [<https://perma.cc/T8G6-6ECS>]. This picture was taken in 2013 when the piece was available for private purchase from Christie's auction house in New York. *Id.*

<sup>30</sup> See Claes Oldenburg, THE ART STORY, <https://www.theartstory.org/artist/oldenburg-claes/> [<https://perma.cc/9HAA-8JQM>]

<sup>31</sup> *Id.*

a dramatic reconfiguration of an item that, in its small utilitarian state, was once an office staple. Unlike the urinal, Oldenburg's art objects were obviously not utilitarian.

Although some copyright limitations make it difficult to claim protection in works like *Fountain*, there are also oft cited cases that might lead to the opposite conclusion.<sup>32</sup> The Copyright Act states clearly that concepts, ideas, and facts are not protected.<sup>33</sup> They are the structural building blocks for civil discourse and therefore ineligible for copyright protection.<sup>34</sup> Similarly, items such as blank canvases hung on a museum wall or painted in one single color may be such basic parts of artistic building blocks, that no property rights should inhere in them. How can any artist declare a blank canvas to be art and still meet the traditional originality standard requiring imposition of some creativity on an object obtain protection? The requisite level of creativity may be minimal in degree, but there must still be some creativity present; as Justice O'Connor noted in *Feist Publications, Inc. v. Rural Telephone Service Co.*:

Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. . . . To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be.<sup>35</sup>

This notion is echoed in another renowned case—*Alfred Bell v. Catalda Fine Arts*—involving the copyrightability of mezzotints intended to reproduce famous works as closely as possible, where the Second Circuit noted:

Accordingly, we were not ignoring the Constitution when we stated that a 'copy of something in the

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<sup>32</sup> See Glenn Cheng, *The Aesthetics of Copyright Adjudication*, 19 UCLA ENT. L. REV. 113, 127–30 (2012) (discussing arguments for both sides).

<sup>33</sup> See 17 U.S.C. § 102(b).

<sup>34</sup> See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347–58 (1991).

<sup>35</sup> *Id.* (citations omitted).

public domain' will support a copyright if it is a 'distinguishable variation'; or when we rejected the contention that 'like a patent, a copyrighted work must be not only original, but new', adding, 'That is not . . . the law as is obvious in the case of maps or compendia, where later works will necessarily be anticipated.' All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.' Originality in this context 'means little more than a prohibition of actual copying.' No matter how poor artistically the 'author's' addition, it is enough if it be his own.<sup>36</sup>

These well-known and oft quoted passages require some minimum intervention by an artist upon an object to qualify as an original, and therefore copyrightable, work. Placement in a location, upon a display stand, or on the wall of a museum does nothing notable to the object itself. Presumably, Justice O'Connor would have trouble protecting Duchamp's work. The only possible intimation of originality was the artist's endeavor—intent if you will—to change perceptions about the everyday nature of the object in the minds of those who view it by placing it in a location that it never or rarely occupied before. Suggesting that any object—even a urinal—may take on aesthetic pretensions undermines prior understandings about what constitutes art, challenges artists to think in wholly different ways about the nature of their enterprise, and forces viewers to think more broadly about art's outer limits.<sup>37</sup>

Those notions form the basis for a claim of originality in works such as *The Fountain*. Given the importance of that work's public

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<sup>36</sup> Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102–03 (2d Cir. 1951) (citations omitted).

<sup>37</sup> This sort of claim has, of course, been subject to humorous gibes. See, e.g., Ardell Padenom, *Art is Anything You Can Get Away With*, PADENOM (May 14, 2011), <http://ardellpadenom.blogspot.com/2011/05/art-is-anything-you-can-get-away-with.html> [<https://perma.cc/Q3MR-B4F5>]. Andy Warhol has often been quoted as saying "Art is anything you can get away with," but the crack actually originated with Marshall McLuhan. *Id.*

display in the history of art, it would be surprising, to say the least, if copyright law did not protect it. And why should physically altering an object itself be the *sine qua non* of originality? Finding original, and in most of these cases totally new ways, to conjure up aesthetic judgments in the minds of viewers is just as imaginative—maybe more so—as physically modifying a preexisting object, using an artistic substance to make a new work, or mimicking a preexisting classic. For artists, placement of works in particular locations or adjacent to other objects is often a key element of “making” or “completing” the works themselves.<sup>38</sup> Observers in a modern art museum, like the spectacle pranksters at the San Francisco Museum of Modern Art,<sup>39</sup> might find the art silly or deserving of mockery. They might say, “Gee, I can do that.” But those museum visitors were not the first people to create this art! It took creative souls like Duchamp, Cattelan, or Banksy to challenge preexisting aesthetic norms. These innovators were creative and skeptics should give credit where it is due.

Granting *Fountain* protection may seem unusual but doing so actually falls within the copyright mainstream. The best examples of this may be books treated as factual works after their authors present claimed they were true historical accounts, even though virtually all reputable historians found them to be fictional. *Hoehling v. Universal City Studios, Inc.* highlights this phenomenon.<sup>40</sup> In 1962, A. A. Hoehling wrote *Who Destroyed the Hindenburg?*, claiming the final segments of the volume were a factual account of the sabotage that downed the large German dirigible.<sup>41</sup> When others later used Hoehling’s account in books and movies, he sued for copyright infringement and lost.<sup>42</sup> The court concluded that if an author presents an historical interpretation of a

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<sup>38</sup> See Richard Chused, *Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 COLUM. J.L. & ARTS 583, 599 (2018) (making a similar argument about large assemblages of street artworks at major street sites).

<sup>39</sup> See Mele, *supra* note **Error! Bookmark not defined.** (identifying the action of teenagers Kevin Nguyen and T.J. Khayatan placing eyeglasses on the floor of the San Francisco Museum of Modern Art).

<sup>40</sup> *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 978 (2d Cir. 1980).

<sup>41</sup> See *id* at 975.

<sup>42</sup> See *id* at 977.

story as factual, it will be treated that way in a copyright dispute.<sup>43</sup> Because facts, like ideas, are not copyrightable,<sup>44</sup> and his claim involved copying of his story-line but not the way it was expressed, Hoehling's infringement allegation could only fail. It may have taken a bit of chutzpah for Hoehling to make an untrue. In that vein, Hoehling certainly was no different from Duchamp, Banksy, or Cattelan. His claim of creative license, however, caused him to lose his case. In many settings, creativity is seen as out-rageous, silly, or boldly beyond the capacity of society to accept. This often is just the sort of thing that the law of creativity ought to protect! Creativity is what provokes reactions in the minds of viewers and readers—exactly what one would expect good visionary work to elicit.

There are many prominent examples of the impact an author's frame of mind has on the scope of copyright protection. Consider Mark Rothko's acclaimed Chapel at the Menil Collection in Houston,<sup>45</sup> or the display of Monet's *Water Lilies* paintings at the Musée de l'Orangerie in Paris.<sup>46</sup> In each case, artists collaborated with architects to place a well-conceived array of related works in spaces that fulfilled the painters' preferences about how best to present their work to the public. Moving one of Rothko's paintings out of The Chapel or one of Monet's pieces out of l'Orangerie would crush their artistic goals. To reject protection of works like *The Fountain* is to cast off twentieth, and now twenty-first century, artistic trends incorporating artistic placement and juxtapositions of works as crucial features of the works themselves. After all, composition is an essential element in painting. Surely, similar considerations should be taken into account when placing a painting amid other related works. Using the creator's intent as an influential factor in settings similar to Duchamp's novel displays of readymade objects makes a great deal of sense.

But relying on intent also creates innumerable challenges. Was the placement of the eyeglasses on the floor of the San Francisco

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<sup>43</sup> See *id* at 978–79.

<sup>44</sup> See 17 U.S.C. § 102(b).

<sup>45</sup> See ROTHKO CHAPEL, <http://www.rothkochapel.org/learn/about/> [<https://perma.cc/J9MU-YDF4>].

<sup>46</sup> Claude Monet's *Water Lillies*, MUSÉE DE L'ORANGERIE, <https://www.musee-orangerie.fr/en/article/claude-monets-water-lilies> [<https://perma.cc/9HX6-9QHT>].



Museum of Art intended as art, a prank, or both? Is answering that question even important? Can humor and irony be embedded in artistic works? How can intention, meaningful to copyright law, be distinguished from a frame of mind with no particular significance? How important are the reactions of viewers to the notion of what art may be?

Similarly, was Banksy's insertion and use of a shredder embedded in the frame of a work sold at auction a statement of artistic intent or a remarkable prank?<sup>47</sup> Or what of Cattelan's banana taped to a gallery wall?<sup>48</sup> Does Justice O'Connor's objective desire to discern physical differences imposed by an artist upon an object or a work need changing to take subjective goals into account?<sup>49</sup> In short, discerning intent is a slippery task at best. Indeed, rather than describing Duchamp's intention as an inspiring tale about undermining traditional aesthetics by treating everyday objects as artistic, philosopher Steven Hicks<sup>50</sup> describes Duchamp in a cynical, if not perverse way:

The artist is not a great creator—Duchamp went shopping at a plumbing store. The artwork is not a special object - it was mass-produced in a factory. The experience of art is not exciting and ennobling - at best it is puzzling and mostly leaves one with a sense of distaste. But over and above that, Duchamp did not select just any ready-made object to display. In selecting the urinal, his message was clear: Art is something you piss on.<sup>51</sup>

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<sup>47</sup> See Reyburn, *supra* note 3.

<sup>48</sup> See Pogrebin, *supra* note 2.

<sup>49</sup> See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991).

<sup>50</sup> Hicks is in the Philosophy Department of Rockford University in Rockford, Illinois, and is the university's Executive Director of the Center for Ethics and Entrepreneurship. See *Campus Directory*, ROCKFORD UNIV., <https://www.rockford.edu/campus-directory/hicks-stephen/> [<https://perma.cc/63T5-FP6B>].

<sup>51</sup> See *The Fascinating Tale of Marcel Duchamp's Fountain*, *supra* note 1. According to this essay, the work was actually "pissed" on. *Id.*

Claims have been made that *The Fountain* was indeed urinated on.<sup>52</sup>

Hicks forces us to ask whether intent fulfilling the originality requirement may be tongue in cheek, harshly dismissive of traditional artistic understandings, or both? Or must intent present some aesthetic judgment? Will placing spectacles on the floor of a museum or taping a rotting object on a museum wall, like the banana in Cattelan's *The Comedian*, come with the requisite frame of mind? Much celebrated art reached this lofty state by breaking new ground—using a different technique, a new sense of perspective, an abstract form presented in a new way, or a portrayal of figures or the human condition in a new way. Legal norms should encourage the art world to recognize new aesthetic theories that provide important commentary on human experience. Intent need not be directly related to a particular art object but simply to technique, culture, or expectations about the behavior of art viewers. Most such shifts have easily fallen into the copyright basket. If this is what intent requires, then Duchamp's work more than qualifies.

All these questions about intent require one more look at *The Fountain*. There actually was one, perhaps obvious, alteration to the urinal—the addition of the cryptic “R Mutt 1917” drawn scrawled on its lip.<sup>53</sup> That and other aspects of *The Fountain* may make the originality issue much easier to resolve. First, the whole episode might simply be a spoof or a parody of then extant artistic practices. In that sense, it was like Cattelan's *The Comedian* except that Duchamp's humor was more subtle. Humor is well protected as original for copyright purposes.<sup>54</sup> If humor or irony was part of Duchamp's motivation or part of the spectacle event in San Francisco, then it has long been honored with protectable status. A funny new joke certainly meets the originality standard. Humor even enjoys a privileged status in fair use law—parody, for example, typically takes some material from the preexisting work it mocks,

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<sup>52</sup> See *When Brian Eno & Other Artists Peed in Marcel Duchamp's Famous Urinal*, OPEN CULTURE (Sept. 24, 2015), <http://www.openculture.com/2015/09/when-brian-eno-other-artists-peed-in-marcel-duchamps-famous-urinal.html> [https://perma.cc/Q5743LHE]; *The Fountain*, *supra* note 1.

<sup>53</sup> See Marcel Duchamp's *Fountain*, *supra* note 1.

<sup>54</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 597 (1994).

but courts consistently recognize its transformative nature in analyzing fair use.<sup>55</sup> Additionally, the Supreme Court recognized parody as a special and widely accepted form of originality.<sup>56</sup> It is important to note that Duchamp was associated with a group of provocative artists, including Francis Picabia, intent on satirizing and undermining traditional artistic norms.<sup>57</sup>

Other theories about Duchamp's artistic goals for *The Fountain* have been suggested. There are, for example, claims that "R. Mutt" was a pseudonym adopted by Baroness Elsa von Freytag-Loringhoven.<sup>58</sup> There are some who think the Baroness was behind the use of a urinal by Duchamp.<sup>59</sup> Additionally, there are important scholarly art history essays arguing that the piece was deeply sensual or closely related to early twentieth century homoerotic debates. For example, William Camfield, in a thorough essay on *The Fountain*, provided both another explanation for the cryptic "R Mutt 1917" inscription and argued persuasively that the piece carried erotic overtones.<sup>60</sup> When the urinal was submitted to the American Society of Independent Artists for inclusion in its first show in 1917, it was turned in under the name of Richard Mutt.<sup>61</sup> Camfield also noted the sensual curves of the item when it was removed from practical use and placed in a "prone" position;<sup>62</sup> he contended that Duchamp actually viewed it as erotic.<sup>63</sup>

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See, e.g., Mathilde, *Duchamp, Picabia, New York Dada and the Machine*, WORLD OF ART (May 7, 2015), <https://worldartworld.wordpress.com/2015/05/07/marcel-duchamps-ready-mades/> [https://perma.cc/4K92-4E9X].

<sup>58</sup> Josh Jones, *The Iconic Urinal & Work of Art, "Fountain," Wasn't Created by Marcel Duchamp But by the Pioneering Dada Artist Elsa von Freytag-Loringhoven*, OPEN CULTURE (July 5, 2018), <http://www.openculture.com/2018/07/the-iconic-urinal-work-of-art-fountain-wasnt-created-by-marcel-duchamp.html> [https://perma.cc/HH2M-PVM2].

<sup>59</sup> See Hustvedt, *supra* note 1.

<sup>60</sup> See William A. Camfield, *Marcel Duchamp's Fountain Its History and Aesthetics in the Context of 1917*, 16 DADA/SURREALISM 64 (1987).

<sup>61</sup> *Id.* at 68, Paul B. Franklin, *Object Choice: Marcel Duchamp's Fountain and the Art of Queer Art History*, in 23 OXFORD ART J. 1, 11–12 (2000).

<sup>62</sup> *Id.* Camfield, *supra* note 60, at 75–79.

<sup>63</sup> Camfield, *supra* note 60, at 75–79. The most important essay was penned by Louise Norton. *Id.* at 78–79.

Another notable appraisal confirms the erotic overtones of the urinal by making the trenchant point that *The Fountain* emerged from Duchamp amid public debates over the propriety of installing *pissoirs* (public toilets) in Paris.<sup>64</sup> Many publicly voiced concerns that they were being used by gay men for liaisons.<sup>65</sup> The selection of a urinal for display at a major art exhibition would certainly have been a criticism of such concerns.<sup>66</sup> In a brief 1917 editorial in *The Blind Man*, the author argued that the urinal was both vulgar and plagiarism—asserting that it was merely an unoriginal piece of plumbing paraphernalia.<sup>67</sup> Indeed, these were soundly rejected in language almost surely approved by Duchamp, one of the editors of the briefly extant journal.<sup>68</sup> It read, in part humorously and entirely seriously, as follows:

*The Richard Mutt Case*

They say any artist paying six dollars may exhibit.

Mr. Richard Mutt sent in a fountain. Without discussion this article disappeared and never was exhibited.

What were the grounds for refusing Mr. Mutt's fountain;

1. Some contended that it was immoral, vulgar.
2. Others It was plagiarism, a plain piece of plumbing.

Now Mr. Mutt's fountain is not immoral, that is absurd, no more than a bath tub is immoral. It is

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<sup>64</sup> Franklin, *supra* note 61, at 25.

<sup>65</sup> *Id.* at 25.

<sup>66</sup> *Id.* at 31–34.

<sup>67</sup> See THE BLIND MAN NO. 2 (May 1917), [https://www.toutfait.com/issues/issue\\_3/Collections/girst/Blindman2/5.html](https://www.toutfait.com/issues/issue_3/Collections/girst/Blindman2/5.html) [<https://perma.cc/EDX6-MA3J>]. Only two editions of *The Blind Man* were published. They appeared in 1917 and were edited by Marcel Duchamp, Beatrice Wood, and Henri-Pierre Roché. Nick Bennett, *The Blind Man*, THE BROOKLYN RAIL (June 2018), [https://brooklynrail.org/2018/06/art\\_books/The-Blind-Man](https://brooklynrail.org/2018/06/art_books/The-Blind-Man) [<https://perma.cc/H8SL-N76X>].

<sup>68</sup> *Id.*

a fixture that you see every day in plumbers' show windows.

Whether Mr. Mutt with his own hands made the fountain or not has no importance. He **CHOSE** it. He took an ordinary article of life, placed it so that its useful significance disappeared under the new title and point of view—created a new thought for that object.

As for plumbing, that is absurd. The only works of art America has given are her plumbing and her bridges.<sup>69</sup>

Given this variety of interesting analytical structures for *Fountain*, it becomes virtually impossible to claim that the work lacked originality. It also becomes impossible to deny that it is a pictorial, graphic, or sculptural work within the meaning of the Copyright Act—that a “useful article . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”<sup>70</sup> While a urinal hanging on the wall in a men's room or awaiting sale in a plumbing supply store is certainly neither original nor a sculptural work, its character changes when it is placed back side down on a pedestal for purposes of display in a setting communicating a variety of artistic, cultural, moral, and humorous perspectives.<sup>71</sup>

As Justice Thomas noted in the recent case of *Star Athletica, LLC v. Varsity Brands, Inc.*, the statute requires the fulfillment of a two-part test in order to be a sculpture rather than a utilitarian object.<sup>72</sup> The first prong requires that a viewer “be able to look at the useful article and spot some two- or three-dimensional element that

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<sup>69</sup> Camfield, *supra* note 60, at 76.

<sup>70</sup> 17 U.S.C. § 101.

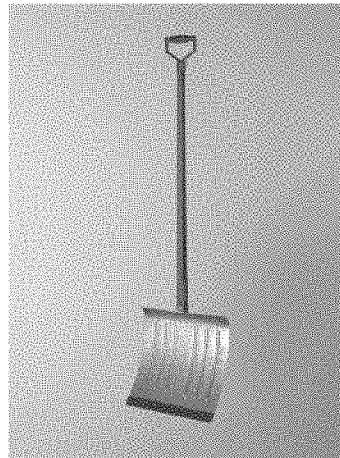
<sup>71</sup> See Camfield, *supra* note 60, at 75–79.

<sup>72</sup> *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017).

appears to have pictorial, graphic, or sculptural qualities.”<sup>73</sup> Given the wide array of perspectives about the possible meaning of *The Fountain*, it is difficult to deny that the placement of a urinal in the “wrong” position in an artistic environment changes its potential utility into something quite different. Justice Thomas goes on to opine that the sculptural “feature must be able to exist as its own pictorial, graphic, or sculptural work . . . once it is imagined apart from the useful article.”<sup>74</sup> The same imagination that allows a viewer to “spot” a sculptural element in the urinal explains why it can be seen as something separate and apart from the urinal as a functional item.<sup>75</sup> Other famous Duchamp works—*Bicycle Wheel* and *In Advance of a Broken Arm*—fulfill the separability requirements for similar reasons, since Duchamp’s intention in all of these works was to remove them from their “ready-made,” typically utilitarian appearance, and display them in a setting that established them as artistic works.<sup>76</sup>



*Bicycle Wheel*



*In Advance of the Broken Arm*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> The original of this work has been lost, but the replicas pictured here are in the collection of the Museum of Modern Art. See Marcel Duchamp, *Bicycle Wheel*, in MUSEUM OF MOD. ART, [https://www.moma.org/learn/moma\\_learning/marcel-duchamp-bicycle-wheel-new-york-1951-third-version-after-lost-original-of-1913/](https://www.moma.org/learn/moma_learning/marcel-duchamp-bicycle-wheel-new-york-1951-third-version-after-lost-original-of-1913/) [https://perma.cc/5YVE-RTAZ]; see also *Broken Arm*, *supra* note 22. The *Broken Arm* piece is typically displayed hanging from a wire attached to the ceiling so it can rotate with the ambient breezes in the gallery.

Similar conclusions about originality and artistic qualities apply to Cattelan taping a banana to a wall in *The Comedian*. Perhaps, unlike Duchamp, the banana used in that work was not the first instance in which certain ideas were brought to life. Decaying materials were used in other art works, though Cattelan's may have been the first to use a banana.<sup>77</sup> The intentions—pranksterism, commentary on decay, and critique of extant art movements—were not new.<sup>78</sup> Note that Duchamp's motivations traveled in similar arenas: the idea of using decay as a statement about temporality, the rottenness of contemporary artistic practice, and life and death can be made evident in an infinite number of ways.<sup>79</sup> And, of course, ideas are not copyrightable; only the expression of ideas is protected.<sup>80</sup> Cattelan simply selected a banana as his expressive mode. And, like *Fountain*, the intention was made palpable by imposing his will upon a tangible object, largely by altering its location and presentation.<sup>81</sup>

The artist's gallerist—Emanuel Perrotin<sup>82</sup>—claimed that every aspect of *Comedian* was “carefully considered from the shape of the fruit, to the angle it has been affixed with duct tape to the wall, to its placement in the booth—front and center, on a large wall that could

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<sup>77</sup> There is a lengthy tradition of allowing works to rot or decay. Like Cattelan and many others, Edvard Munch was known for using decaying materials in his work as part of a commentary on life, death, decay, and temporality. See DAVID A. SCOTT, ART: AUTHENTICITY, RESTORATION, FORGERY 397 (2016). Or explore Urs Fischer's candle sculptures—large wax compositions mimicking famous works that he lights and allows to melt into puddles over time. See Alice Yoo, *Urs Fischer's Dramatically Melting Sculptures*, MY MODERN MET (May 1, 2012), <https://mymodernmet.com/urs-fischer-melting-sculptures/> [<https://perma.cc/Q5FZ-VKTJ>].

<sup>78</sup> Perhaps the namesake for much of this was not Duchamp, but Francis Picabia, who steadfastly made work undercutting extant artistic movements. See Sam Ben-Meir, *Francis Picabia: A Painter for This Moment*, GLOB. RSCH. (Feb. 24, 2017), <https://www.globalresearch.ca/francis-picabia-a-painter-for-this-moment/5576545> [<https://perma.cc/YSH6-3ZJG>].

<sup>79</sup> See *supra* note 77.

<sup>80</sup> 17 U.S.C. § 102(b).

<sup>81</sup> See *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010. Though not discussed here, it also may be true that the combination of a banana with duct tape and a wall may itself be an original composition. Perhaps the work's originality arises not just because Cattelan used a banana, but also tape and a wall.

<sup>82</sup> See PERROTIN, <https://www.perrotin.com/about> [<https://perma.cc/8J8H-F29W>].

have easily fit a much larger painting.”<sup>83</sup> That statement is confirmed in the Certificate of Authenticity and Installation Instructions that are transferred to a buyer when an instance of *The Comedian* is sold to a purchaser, allowing the installation of the work at another location.<sup>84</sup> The document contains very precise instructions on how to effect an installation.<sup>85</sup> *The Comedian* story is relatively similar to that of the Oscar Wilde photograph labeled as original in the famous case *Burrow-Giles Lithographic Company v. Sarony*.<sup>86</sup> According to Justice Miller, the staging of the pose and background was more than enough to make the photograph original.<sup>87</sup> In addition, it is worth repeating that originality need not be novel. Just a minimal imposition of human will upon an object will suffice.<sup>88</sup> In these cases, the imposition of will does not need to be directly on the appearance of the object itself, but on its placement and in the perceptions its placement generates.<sup>89</sup> Therefore, *The Comedian* qualifies.

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<sup>83</sup> Sarah Cascone, *Maurizio Cattelan is Taping Bananas to a Wall at Art Basel Miami Beach and Selling Them for \$120,000 Each*, ARTNET (Dec. 4, 2019), <https://news.artnet.com/market/maurizio-cattelan-banana-art-basel-miami-beach-1722516> [<https://perma.cc/7XFG-E8EA>]; see also Jordan Hoffman, *‘It is Something Deeper’: David Datuna on Why He Ate the \$120,000 Banana*, THE GUARDIAN (Dec. 11, 2019), <https://www.theguardian.com/artanddesign/2019/dec/11/david-datuna-120000-banana-interview-art-basel-miami> [<https://perma.cc/RRV8-PEPQ>].

<sup>84</sup> See Cascone, *supra* note 83. Much contemporary art involves a plan for installation of a work rather than an actual, tangible object. Sol LeWitt is famous for such work. When such art is sold, the artist conveys a certificate of authenticity to the buyer allowing installation of the work. For a thorough analysis of the copyright consequences of this practice, see Richard Chused, “Temporary” Conceptual Art: Property and Copyright, *Hopes and Prayers*, 45 RUTGERS COMPUT. & TECH. L.J. 1, 2 (2019) [hereinafter Chused, “Temporary” Conceptual Art].

<sup>85</sup> Katherine Wisniewski at the gallery was kind enough to send the author an unsigned copy of the Certificate and Instructions. It contains very detailed images with precise measurements about the placement and taping of the banana on the wall. E-mail from Katherine Wisniewski, Assoc. Dir. Of Comm’n and Mktg., Perrotin, to author (Feb. 20, 2020, 3:31 EST) (on file with author) [hereinafter E-mail from Katherine Wisniewski].

<sup>86</sup> 111 U.S. 53, 60 (1884).

<sup>87</sup> *Id.* at 60.

<sup>88</sup> See *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102–03 (2d Cir. 1951) (citations omitted). See discussion of *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.* and *Alfred Bell v. Catalda*, *supra* notes 34–36.

<sup>89</sup> See *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017); *Burrow-Giles*, 111 U.S. at 53.



The spectacles on the museum floor were original. Kevin Nguyen and TJ Khayatan—the two young men who created the spectacle of spectacles—were quoted by *The New York Times* as performing their glasses routine because of the weak quality of what was on display at the San Francisco Museum of Modern Art:

“Is this really what you call art?” Kevin said in an interview over the weekend.

TJ added, “We looked at it and we were like, ‘This is pretty easy. We could make this ourselves.’”<sup>90</sup>

Their intent was quite similar to that of Duchamp or Cattelan. They asked highly aesthetic questions about the nature of artistic endeavors, challenged expectations about what sorts of objects should be in museums, and wondered with great anticipation what human reactions would become visible.

In short, Nguyen and Khayatan became artists in a flash. Good for them! They thought the art they viewed in the museum was simple minded and pointless.<sup>91</sup> Their reaction was to spontaneously mimic the silliness they saw.<sup>92</sup> Essentially, they made a parody—a much more serious form of creativity than mere pranksterism. It worked like a charm. Museum visitors reacted as if the museum environment had been altered in a new and provocative way.<sup>93</sup> In short, it hardly was an event without originality—spontaneous but nonetheless new, instinctive but nonetheless astute, prankish but nonetheless artistically challenging, funny but nonetheless mad-denyingly successful.

## II. FIXATION: BANANAS

The Copyright Act provides that a work is fixed when “its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of

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<sup>90</sup> See Mele, *supra* note 7.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See *id.*

more than transitory duration.”<sup>94</sup> This requirement raises two sets of questions about Cattelan’s *The Comedian*. First, Emanuel Perrotin, Cattelan’s gallerist, claimed that the actual “work” was not really the banana, but the certificate of authenticity confirming that a purchaser had the right to install the work by following the instructions in the certificate on how to do the wall taping.<sup>95</sup> What does that mean for purposes of fixation and perhaps originality? The second poses issues closely related in some ways to originality. Though the Copyright Act does not explicitly require that the artist or the artist’s agent actually cause the fixation, it certainly may be read as requiring that such a step be taken.<sup>96</sup> Merely taking a preexisting object and moving it around, one might think, will not satisfy the standard. In addition, the banana was in a constant process of change and decay. Does that mean the piece may never be fixed? Similarly, what “fixes” *The Fountain*? And what is it that was fixed?

#### A. *Certificates of Authenticity and Fixation*

As noted, David Datuna un-taped and ate one of Maurizio Cattelan’s bananas.<sup>97</sup> Even Perrotin, Cattelan’s gallerist, took one of the bananas off the wall and ate it!<sup>98</sup> He reportedly said, “Maurizio, it’s a good banana, I have to say.”<sup>99</sup> He went on to claim that in the absence of a certificate of authenticity, anyone removing a banana without paying the price owns nothing except a banana digesting in a belly.<sup>100</sup> Sarah Cascone described Perrotin’s explanation of how this particular composition worked as conceptual art:” In a way, explained Perrotin, securing a buyer for the piece completed the artwork. ‘A work like that,’ he said, ‘if you don’t sell the work, it’s

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<sup>94</sup> 17 U.S.C. § 101.

<sup>95</sup> Cascone, *supra* note 84.

<sup>96</sup> 17 U.S.C. § 102.

<sup>97</sup> See Pogrebin, *supra* note 2.

<sup>98</sup> See Rob Picheta, *Someone Ate a \$120,000 Banana that an Artist Had Taped to a Wall*, CNN (Dec. 9, 2019), <https://www.cnn.com/style/article/banana-artwork-eaten-scli-intl/index.html> [<https://perma.cc/2F8S-QM5H>].

<sup>99</sup> *Id.*

<sup>100</sup> See Cascone, *supra* note 83.

not a work of art.'"<sup>101</sup> Perrotin's explanation of the work was more fully explained by Robin Pogrebin:

According to the gallery, Mr. Datuna's stunt did not actually destroy the artwork or whatever monetary value it might have had at that moment. The three buyers who collectively spent about \$390,000 on the taped fruit had bought the concept of the piece, which comes with a certificate of authenticity from the artist, along with installation instructions. It is up to the owners to secure their own materials from hardware and grocery stores, and to replace the banana, if they wish, whenever it rots. After Mr. Datuna consumed the banana, the gallery taped another one to the wall.<sup>102</sup>

The surface implication of this statement is that the actual banana taped to the wall at Miami Basel was not an artwork at all; it was just a banana and some tape on a wall. The actual work was the certificate of authenticity and its accompanying instruction set.<sup>103</sup> That is difficult to accept. Art comes and goes with great regularity. Many works are intended to be temporary. Eliasson's *Waterfalls*, for example, were intended by all concerned to be temporary; and they were taken down after a time.<sup>104</sup> The fixation requirement certainly does not require absolute permanence.

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<sup>101</sup> *Id.*

<sup>102</sup> See Pogrebin, *supra* note 2.

<sup>103</sup> This sort of arrangement with a certificate and instructions is a typical arrangement for many pieces of conceptual art. See, e.g., Chused, "Temporary" Conceptual Art, *supra* note 84, at 10–12. For an analysis of some of the consequences of this practice for works by Sol LeWitt, see *id.* at 1.

<sup>104</sup> Olafur Eliasson, *The New York City Waterfalls*, in PUB. ART FUND, <https://www.publicartfund.org/exhibitions/view/the-new-york-city-waterfalls/> [<https://perma.cc/48CB-AHHQ>]. Another well-known example was a striking installation in Central Park—*The Gates*—by Christo. It was constructed during the winter of 2005 and remained up only for two weeks in February. *The Gates*, in CHRISTO AND JEAN-CLAUDE, <http://christojeanneclaude.net/projects/the-gates> [<https://perma.cc/BDS7-K5ZC>]. 7,503 orange draped gates were built over paths throughout the park. *Id.* The barren winter trees allowed park strollers to see the bright orange gates far into the distance as paths ascended and descended upon hillsides. The experience of walking through *The Gates* was breathtaking.

Many works by artists such as Sol LeWitt, Donald Judd, Dan Flavin, and others are sold the same way.<sup>105</sup> Cattelan transferred three copies of *The Comedian* at Miami Basel.<sup>106</sup> In each case, purchase of a certificate and an instruction set was the *sine qua non* of ownership, allowing the work to be installed and uninstalled in the preferred time frame of the owner.<sup>107</sup> In most of these cases, the artists presumably retained a copyright in the certificate and instructions. And the documents usually contained a drawing of the work and/or expressed how to complete the installation.<sup>108</sup> This means the creator of the idea and composition described in the certificate and instruction document, itself copyrighted, or the creator's successor in interest, must also be consulted before an installation is approved. In short, the certificate and instruction set typically only gives authority to pursue permission to install, not actually to do it unilaterally.<sup>109</sup>

In reality, the ownership structure may be complex after the transfer of a conceptual artwork like *The Comedian*. Each of the three purchasers obtained a non-intellectual property right—a typical tangible property right—in the certificate and instruction document.<sup>110</sup> But a copyright was retained by the artist in those same documents since they were expressive, original, and fixed.<sup>111</sup> When the work is installed, it becomes a *derivative work* of the original expression in the certificate and instructions.<sup>112</sup> The Act defines such a work as one:

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<sup>105</sup> See Chused, “Temporary” Conceptual Art, *supra* note 84, at 2–4; Graham Bowley, *It’s a Banana, It’s Art. And Now It’s the Guggenheim’s Problem.*, N.Y. TIMES (Sept. 18, 2020), <https://www.nytimes.com/2020/09/18/arts/design/banana-art-guggenheim.html> [<https://perma.cc/8H4H-NNYF>].

<sup>106</sup> See Pogrebin, *supra* note 2.

<sup>107</sup> See *id.*

<sup>108</sup> There is no formal copyright notice on the certificate of authenticity and instructions for *The Comedian*, but it does contain a series of detailed color diagrams of a property installation and clearly meets both the originality and fixation requirements. See E-mail from Katherine Wisniewski, *supra* note 85. Cattelan surely holds a copyright in the document.

<sup>109</sup> See Chused, “Temporary” Conceptual Art, *supra* note 84, at 2.

<sup>110</sup> See 17 U.S.C. § 202; Pogrebin, *supra* note 2.

<sup>111</sup> 17 U.S.C. § 102.

<sup>112</sup> 17 U.S.C. § 101.

[B]ased upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."<sup>113</sup>

For purposes of this Article, it is critically important to recognize that an installation is a recasting or an adaptation of the original work as expressed in the certificate of authenticity and instructions. Note that installing a derivative work requires permission of the original creator.<sup>114</sup> The original author must be consulted because all derivative works reuse part or all of the original work. In addition, the derivative work only gains protection for the new material it adds to the original; it does not diminish or alter the force of the original copyright.<sup>115</sup> That perfectly describes an installed conceptual artwork like *The Comedian*.

But things may quickly become complicated once we get past the clear-cut part of the copyright structure. The intellectual property rights in a physical, derivative manifestation of the work could be held by a variety of different people, either individually or jointly, depending upon who installed the work.<sup>116</sup> The artist may hold the copyright in the derivative work, as well as that in the certificate of authenticity, if the artist participated in fabricating and installing it.<sup>117</sup> The installers may instead own that interest if the artist did not directly supervise their work.<sup>118</sup> Or perhaps the person owning the certificate and instruction document, if given free reign by the artist

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<sup>113</sup> *Id.*

<sup>114</sup> Matt Knight, *Using Another Author's Work—Is Your Derivative Work Infringing Someone's Copyright?*, *SIDEBAR SATURDAYS* (Aug. 10, 2019), <https://www.sidebaraturdays.com/2019/08/10/derivative-works/> [<https://perma.cc/7MKN-WWFK>].

<sup>115</sup> 17 U.S.C. §103(b).

<sup>116</sup> See 17 U.S.C. § 103; Knight, *supra* note 114.

<sup>117</sup> See Knight, *supra* note 114.

<sup>118</sup> *Id.*

or the artist's successor to proceed with the installation, may be the author of the derivative work.<sup>119</sup> In short, ownership can quickly become multi-faceted. None of this undermines the validity of the copyright held by the artist in the certificate and instructions or the recognition that a particular installation may carry its own copyright as a derivative work.

Therefore, if a work is expressive and contains enough changes from the instructions to be original, copyrights will almost always exist in both the certificate and instructions as well as in an installed version of the work.<sup>120</sup> Consequently, Perrotin's statement that the work was not art until its purchase was misleading, if not simply wrong. For copyright purposes, the certificate and instruction documents almost always satisfy the originality, expression, and fixation requirements. The installed manifestations of those documents also meet those requirements. They are "recast, transformed, or adapted"<sup>121</sup> from the documents, and they too are original and expressive. Many of these works manifest themselves differently from installation to installation, depending on the setting in which they are mounted. Sol LeWitt's wall drawings, for example, vary in appearance depending on the size of the walls used.<sup>122</sup> And in Cattelan's case, mere change of the room environment will force decisions to be made about exactly where to tape the banana to the wall, about which to banana to use, about the length of the pieces of tape to use given the size of the fruit,<sup>123</sup> and perhaps the color to paint the wall. An installation is not an automatic or routinely composed work.<sup>124</sup> This analysis also means

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<sup>119</sup> *Id.*

<sup>120</sup> See 17 U.S.C. § 103.

<sup>121</sup> 17 U.S.C. § 101.

<sup>122</sup> See Chused, "Temporary" Conceptual Art, *supra* note 84, at 22.

<sup>123</sup> The instructions provide "about" 20 centimeters when measuring the first piece of tape. E-mail from Katherine Wisniewski, *supra* note 85. If a very large banana is used, a slightly longer piece could presumably be used. Similarly, the wall color is not prescribed, though the height from the floor and angle of the tape is expressed using "about" again. *Id.* The angle of the banana, of course, is impossible to precisely measure. And the instructions suggest that the fruit be changed every seven to ten days. *Id.* These directions leave enough room for an installer to make independent judgments about the work each time it is placed on a wall, allowing an original derivative copyright to exist.

<sup>124</sup> For a much lengthier analysis of the copyright issues involved in installing a work of conceptual art, see Chused, "Temporary" Conceptual Art, *supra* note 84.

that the important fixation questions in *The Comedian* are not about the certificate and instruction documents. They clearly are fixed in a tangible means of expression. But, as elucidated in the next section, there still may be questions about whether installed, visible, and derivative versions of the work are fixed, even if we assume they are original and expressive.

*B. Object Relocation and Decay*

As with originality, the only aspect of installed banana-style works that may be fixed is the movement of objects into a place of public display. But why should that not qualify as fixation, at least some of the time? The standard should be that if the movement of a preexisting, fixed object to a new place was original, then fixation has occurred. The underlying explanation is fairly simple. Certainly, placing everyday objects into large compositions satisfies the requirement.



Robert Rauschenberg, *Canyon* (1959)

Consider Robert Rauschenberg's influential compositions—combining painting, collage, and assemblage.<sup>125</sup> His important and markedly creative 1959 work *Canyon* is both a prime and historically important example.<sup>126</sup>

Though the stuffed eagle in *Canyon* had no particularly artistic value when on a shelf in a taxidermy shop, it took on compelling artistic force when it was incorporated into a large combine. Rauschenberg's intent was to create a three-dimensional composition.<sup>127</sup> Its placement in the larger work was aesthetic in intent. The bird became part of a fixed work. While some may think that the eagle itself is not fixed for copyright purposes,<sup>128</sup> it obtained that status by Rauschenberg's placement of the object into a large composition. As with artistic intention, relocation of an everyday object often will bestow both originality and fixation upon it.

Though the placements of Duchamp's urinal and Cattelan's banana in new locations were not part of larger compositional works like Rauschenberg's combines, the artists' intentions were similarly aesthetic. Moreover, the placements were entirely original. It would be odd if the placement of a preexisting object in a combine is statutorily construed as fixed while its placement in a novel gallery setting is not. In both cases, new compositions were created. In the single object placement cases, the gallery locations create dramatically new environments for the works. The process is quite similar to the composition of Rothko's Chapel at the Menil Collection, Monet's *Water Lilies* at the Musée de l'Orangerie, or Nevelson's constructions. It was the placement of each individual painting or sculptural element, not just their individual, tangible status, that was part of their copyright fixation.

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<sup>125</sup> Robert Rauschenberg, *Combines*, CENTRE POMIDOU (1953), <http://mediation.centrepompidou.fr/education/ressources/ENS-Rauschenberg-EN/ENS-rauschenberg-EN.htm> [<https://perma.cc/2EHJ-NYWZ>].

<sup>126</sup> The text image is on the site of the Museum of Modern Art. Robert Rauschenberg, MUSEUM OF MOD. ART (1959), <https://www.moma.org/collection/works/165011> [<https://perma.cc/6425-FDKZ>].

<sup>127</sup> It may, for example, not be original. The eagle preexisted its stuffing and preservation. Nothing about the object itself was particularly new or creative.

<sup>128</sup> Given the author's position about fixation of *The Fountain*, however, the author believes the eagle could be fixed if it is used by itself for artistic purposes.



This idea also applies to both *The Fountain* and the spectacles on the floor of the San Francisco Museum of Modern Art. Once intentionally placed in an aesthetically interesting location, the spectacles became fixed as copyrightable sculptural works. And the newly located objects need not be in their places of fixation for very long. The requirement that a work be fixed for "a period of more than transitory duration" imposes a very short-term limitation.<sup>129</sup> If presence of software in a computer's volatile memory is a fixed copy of a protected work,<sup>130</sup> then certainly the urinal and spectacles fulfill that element of the fixation requirement.

A more challenging issue is raised when objects used in a work either constantly change while on display or change in one dramatic moment. Such projects were and are part of a large cultural set of artistic endeavors exploring the relationships between stability and instability, life and death, and permanence and impermanence. Instability was, of course, a major copyright problem with *The Comedian*. A banana, whether on a tree ripening, in a bowl waiting to be eaten, or on a wall decaying, constantly changes. Cattelan's work, in a biological sense, was never totally stable.

The definition of fixation creates significant ambiguity in settings involving changing works. The Copyright Act defines a fixed work as one that is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."<sup>131</sup> This definition assumes the possibility that some art objects will change over time. They are only required to be "sufficiently permanent or stable," not just

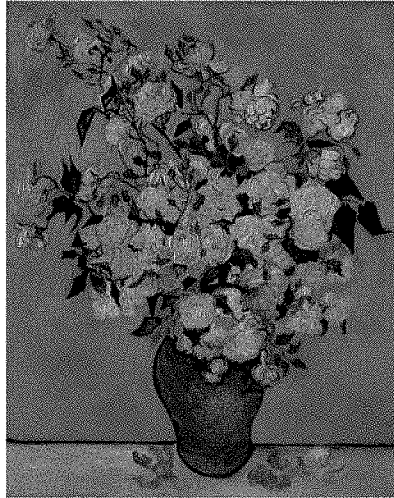
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<sup>129</sup> 17 U.S.C. § 101. As noted at the outset of this Article, the original version of *The Fountain* disappeared shortly after it was photographed by Alfred Stieglitz. Though it existed for only a short time, that certainly met the duration requirement. See *Marcel Duchamp and the Fountain Scandal*, PHILA. MUSEUM OF ART (Mar. 27, 2017), <https://press.philamuseum.org/marcel.org/marcel-duchamp-and-the-fountain-scandal/> [<https://perma.cc/7A7V-4RYV>].

<sup>130</sup> See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993) (involving the protection of a computer program when it is moved from a storage device into memory, which empties out when the program is shut down or the computer is turned off).

<sup>131</sup> 17 U.S.C. § 101.

permanent or stable, to be perceptible or communicated.<sup>132</sup> Pure permanence is not part of the definition. The underlying problem concerns the potential meaning of this standard in different varieties of change situations—ones where alteration occurs so slowly that people do not perceive the change or where transformations are continuously obvious to the human eye. Discussion of four examples will facilitate working through the problems of fixation and instability—the use of evanescent paints in many well-known art works,<sup>133</sup> Urs Fischer’s burning candle sculptures,<sup>134</sup> Olafur Eliasson’s 2008 installation of *Waterfalls* on the East River in New York City,<sup>135</sup> and Banksy’s shredding of *Girl with Balloon* at Sotheby’s in London in 2018.<sup>136</sup> In each of these situations there was ongoing or sudden alteration in the nature of an artistic composition.



Vincent Van Gogh, *Roses* (1890)

<sup>132</sup> *Id.*; see also Dawn Leung, *A Fixation on Moral Rights: The Implications of Kelley v. Chicago Park District for Copyright and VARA Protection*, 4 ARIZ. ST. SPORTS & ENT. L.J. 1, 22 (2014).

<sup>133</sup> See Sophie Haigney, ‘The Scream’ is Fading. *New Research Reveals Why.*, N.Y. TIMES (Feb. 7, 2020), <https://www.nytimes.com/2020/02/07/arts/design/the-scream-edvard-munch-science.html> [<https://perma.cc/UU5V-GYYW>]; see *infra* pp. 198-99.

<sup>134</sup> See Yoo, *supra* note 77.

<sup>135</sup> See *The New York City Waterfalls*, *supra* note 104. See *infra* pp. 202-03.

<sup>136</sup> See Greg Kumparak, *Banksy Piece Immediately Shreds Itself After Being Sold for \$1.1M*, TECHCRUNCH (Oct. 6, 2018, 1:48PM), <https://techcrunch.com/2018/10/06/banksy-piece-immediately-shreds-itself-after-being-sold-for-1-25m/> [<https://perma.cc/38ES-EV78>]; see *infra* pp. 208-10.

Much of the problem dissolves when considered as a matter of day to day reality. All things on earth change constantly, some quickly and some quite slowly. All art works, even the most iconic paintings, are in a constant process of decay. Conservation efforts may return a composition to its original appearance in large part, but the original work is never fully restored.<sup>137</sup> Among the most noted examples are some of the works of Vincent Van Gogh—especially his pink rose compositions.<sup>138</sup> He often used a blush pink pigment—red lake—that is notorious for its highly fugitive hue.<sup>139</sup> The blooms in the 1890 painting entitled *Roses*, pictured above, held by the Metropolitan Museum of Art.<sup>140</sup>, originally were brightly colored.

It would be shocking if Van Gogh's works were recently created and then denied copyright protection because of anticipation that the paint pigments would degrade, especially when exposed to light. Natural, slow moving changes are inherent in all works of art, indeed of all things on earth. The legal status of the objects should not be altered when an artist makes this natural process an overt element of an artistic work rather than a "hidden" progression buried in the nature of the materials used.

The issues are a bit more difficult when the processes of change or decay are so obvious, continuous, or intentional that virtually anyone can perceive that something is happening. That may be true of *The Comedian*, though decay of the banana is not actually

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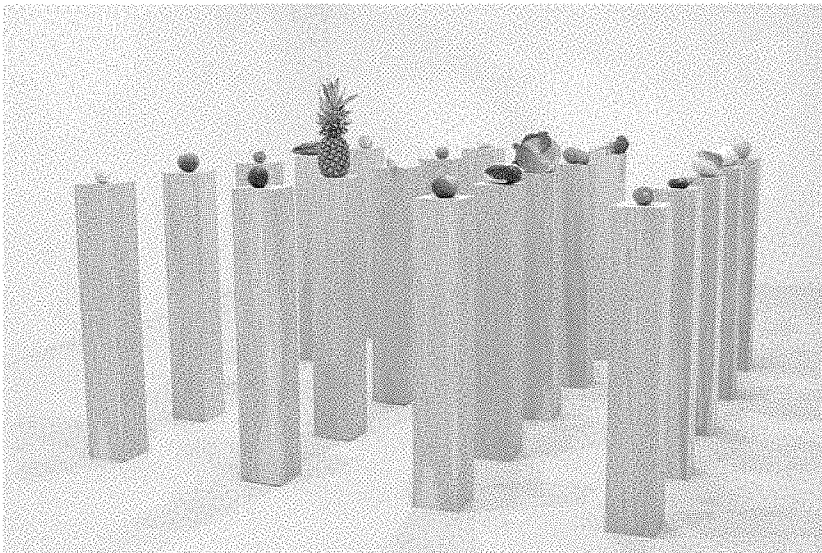
<sup>137</sup> There are a number of other very well-known painters whose works have similar problems. For a recent survey of these painters, see Haigney, *supra* note 133.

<sup>138</sup> *Id.* In addition to work by Munch, Haigney also mentions Van Gogh's *The Bedroom* (1889), in which purples have faded to blues, and other artists like Matisse. *Id.*

<sup>139</sup> See Sarah Everts, *Van Gogh's Fading Colors Inspire Scientific Inquiry*, CHEM. & ENG'G NEWS (Feb. 1, 2016), <https://cen.acs.org/articles/94/i5/Van-Goghs-Fading-Colors-Inspire.html> [<https://perma.cc/2G5E-RCCE>]. *Id.*

<sup>140</sup> This public domain image is available online. . See *Roses* by Vincent Van Gogh, available at METRO. MUSEUM OF ART, <https://www.metmuseum.org/art/collection/search/436534> [<https://perma.cc/PW6P-9BE4>]. Museum investigations discovered traces of the original color at various locations on the canvas. For more information on Van Gogh's color longevity issues, see Nina Siegal, *Van Gogh's True Palette Revealed*, N.Y. TIMES, ( Apr. 29, 2013), <https://www.nytimes.com/2013/04/30/arts/30iht-vangogh30.html> [<https://perma.cc/FUF9-FVQR>].

perceived moment to moment. It enters our thought processes because of what we know about bananas. A recent example that is quite similar to *The Comedian* is a work by Darren Bader consisting of forty pieces of vegetables and fruit that was exhibited this year at the Whitney Museum in New York.<sup>141</sup> As shown in the image below, they were placed on pedestals like Duchamp's *Fountain*. The food items were "sourced and refreshed from a weekly Fresh Direct delivery and regular trips to a nearby Chelsea fruit market."<sup>142</sup> In fact, the decay of fruit on public display is not dramatically different from the loss of vibrancy in Van Gogh's pigments. The change just occurs somewhat more rapidly.<sup>143</sup>



Darren Bader, *Fruits, Vegetables; Fruit and Vegetable Salad* as displayed at the Whitney Museum in 2020.<sup>144</sup>

<sup>141</sup> See Darren Bader, *Fruits, Vegetables; Fruit and Vegetable Salad*, WHITNEY MUSEUM OF AM. ART, <https://whitney.org/exhibitions/fruits-vegetables> [<https://perma.cc/8VQ4-CQD2>].

<sup>142</sup> See Bowley, *supra* note 105; see also *id.*

<sup>143</sup> Museums owning certificates and instructions for conceptual art or installed versions of such works that decay over time have particularly challenging conservation issues. For example, an instance of Cattelan's *The Comedian* is owned by the Guggenheim Museum in New York. *Id.* Other museums own works consisting of fluorescent tubes installed in accordance with instructions created by Dan Flavin. *Id.* What is appropriate conservation action when one of the tubes starts to flicker? For discussion of these and a number of other examples, see *id.*

<sup>144</sup> See Bader, *supra* note 141.

Urs Fischer's candle sculptures provide another example. They are among the most notable and pertinent artistic compositions exhibiting change. Fischer duplicates famous old sculptures or constructs more modern human figures in large wax forms and places wicks through them extending from the tops so they can be lit.<sup>145</sup> After being displayed as obviously fixed wax works, the large candles are lit. The works then degrade into puddles and chunks of fallen wax.<sup>146</sup> The process may take a significant period of time. The "candles" typically are quite large. Here, rather than raising issues of natural decay or rot over time, Fischer makes the process overt. Certainly, an audio-visual work of the melting process would be protected. But what about a particular moment when the melting piece is seen by a gallery visitor?

Thought of as a process, the burning candle is no different from Van Gogh's red lake paint degrading or Cattelan's banana rotting. Thinking of it as an intellectual process, however, does create a difference. The artistic intentions of Van Gogh and Fischer were hardly the same. However, both artists intended to embody a creative work in a form that was easily perceived as both aesthetic and stable at the moment of viewing. The presence of burning wicks may change our imagination as we view a Fischer piece, but at the moment of observation, the candles typically appear just as stable as a painting. While we know candles melt, we don't typically perceive the decay process at most moments or in short viewing intervals

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<sup>145</sup> See Pinar Noorata, *Classic Sculpture Replica Is a Giant Melting Candle*, MY MOD MET (July 2, 2012), <https://mymodernmet.com/urs-fischer-the-rape-of-the-sabine-women-untitled> [<https://perma.cc/M3V3-DJPK>]; see also Yoo, *supra* note 77.

<sup>146</sup> See Yoo, *supra* note 77. Yoo's article contains pictures of one of his most famous wax-candle works mimicking Giambologna's 16th-century sculpture *The Rape of the Sabine Women* at various stages of its melting away. *Id.* It melted at the Venice Biennale in 2011. *Id.* The Whitney Museum had another of his works melt, which depicted a man facing a mirror so "he" could "watch" himself melt! See Jerry Saltz, *This 8-Foot Candle Portrait Mesmerized Me*, VULTURE (May 17, 2016), <http://www.vulture.com/2016/05/urs-fischer-julian-schnabel-wax-sculpture.html> [<https://perma.cc/TT5B-YEJ2>].

even when the wicks are visibly lit.<sup>147</sup> And only a short period of time is necessary to fulfill the statutory fixation definition.<sup>148</sup>

The issues get more difficult with works that overtly embody constant and continuous change in ways we cannot help but perceive. Olafur Eliasson's *Waterfalls* and Banksy's shredding caper are good illustrations. For both, alterations in appearance were obvious to all viewers. With a grant from the Public Art Fund in New York City, Eliasson arranged for the construction of four large scaffolds from 90 to 120 feet tall in the East River between Brooklyn and Governors Island south of Manhattan.<sup>149</sup> A system was built on each scaffold that pumped water up to the top where it cascaded back down into the river.<sup>150</sup> Special Circle Line tour boats ran frequent trips allowing close up visits to each of the four artificial waterfalls.<sup>151</sup> The most notable of the four, located under the Brooklyn Bridge, is displayed below.<sup>152</sup> The falls were lit up, making night visits especially stunning. As with Fischer's work, here too an audio-visual recording of one of the waterfalls in operation was copyrightable, but short of that do other sorts of intellectual property rights attach? Obviously, the installation was never stable moment to moment when operating. And the change was neither natural, as with a Van Gogh painting, nor extremely slow as in a Fischer "candle." We perceive the water's rapid, downward movement constantly. Does that mean it was not fixed unless the supporting scaffold and water systems were original sculptural works? Finding fixation, at least while the waterfalls were in operation, seems problematic, at least initially.

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<sup>147</sup> There, of course, may be moments when the burning process leads to chunks of the candle falling to the ground. Stability obviously is lost at such times, but it is quickly restored once the moment passes.

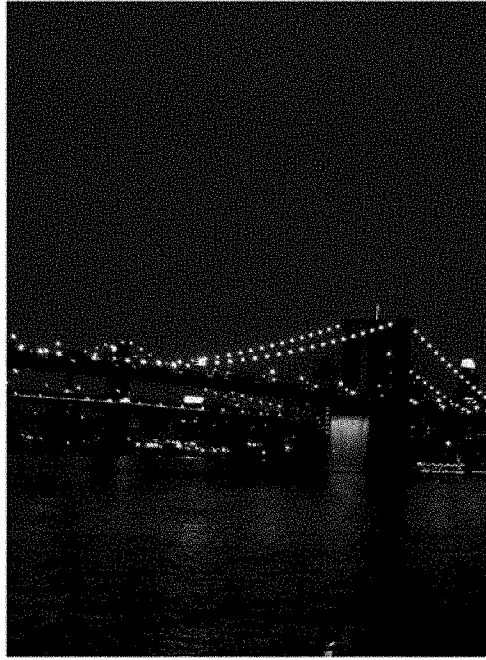
<sup>148</sup> See 17 U.S.C. § 101. It cannot be a performance without a fixation. Someone would have to make an audio-visual fixation of the candle decay for a performance to become copyrightable.

<sup>149</sup> *The New York City Waterfalls*, *supra* note 104.

<sup>150</sup> *Id.*

<sup>151</sup> Conrad Mulcahy, *Guide to Viewing the Waterfalls*, N.Y. TIMES (June 27, 2008), <https://www.nytimes.com/2008/06/27/arts/design/27bwate.html> [https://perma.cc/5P3X-N2RR].

<sup>152</sup> The author shot this image while having dinner at the South Street Seaport on the Manhattan side of the East River just south of the Brooklyn Bridge.



*The Waterfalls* was similar to *Mud Muse*—another Robert Rauschenberg work that was reconstructed in 2017 for a large retrospective exhibition of his work at the Museum of Modern Art in New York.<sup>153</sup> *Mud Muse*, originally on display from 1968 to 1971,<sup>154</sup> was a large vat filled with 8,000 pounds of mud that constantly bubbled in response to the sounds of whatever music was being played at the time.<sup>155</sup> As with the structures behind Eliasson's waterfalls, the vat, mud, mechanical, and electronic equipment were clearly fixed. They might even be deemed an artwork, at least in part. A vat of mud plays a similar role as Eliasson's structures. But when turned on, the mud was in constant motion and the sounds of

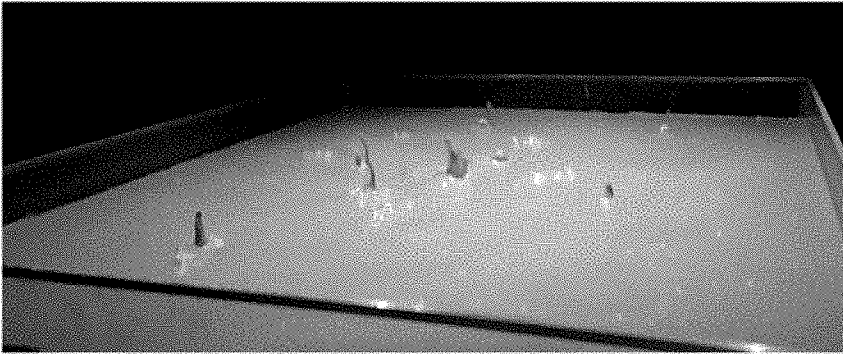
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<sup>153</sup> See *Robert Rauschenberg: Among Friends*, MUSEUM OF MOD. ART, <https://www.moma.org/audio/playlist/40/655> [<https://perma.cc/2H2F-ZGT4>].

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* The author recorded a brief video of the installation while visiting the retrospective. The image in the text is a still from the video. When experiencing the work, the sounds, aroma, and bubbles were mesmerizing. See also Julia Halperin, *Rauschenberg's Musical Machine: The Story Behind the 8,000 Pounds of Mud Inside MoMA*, ARTNET NEWS (May 12, 2017), <https://news.artnet.com/art-world/robert-rauschenberg-mud-moma-958310> [<https://perma.cc/DXE4-EQQA>].

bubbles popping and mud plopping back into the vat were quite audible. Those characteristics are visually discernible even in a single image like the one below.



So, what would happen if another person replicated the work of either Eliasson or Rauschenberg? Would that be infringing? Is constant perceptible motion or change ever fixed? If the overall form is clear, the realm of motion is limited in its spatial realm, and the range of motion is clearly perceptible in its general appearance, why should that be treated differently from Van Gogh's decaying paint, Fischer's slow candle burns, or the decay of a banana? The overall form, shape, range of motion, and impact on our senses of these works is quite clear. All are "fixed" in our minds and the memory lasts for a significant period of time. It is not like a car speeding along a thruway that has no artistic pretensions. The intention of the creators is clearly aesthetic. It is better policy—both from the wording of the fixation definition and from aesthetic notions of artmaking not to treat the word "fixed" to mean unchanging. This is clear when considering the Van Gogh paintings. As with much of the artistic world, the outer limits of the word's meaning must be related, not only to the intentions of the artist but also to the human mind's capacity to perceive what is happening within a defined range of action.

Deeply important changes in our physical perceptions and understandings of the world can help us understand why Eliasson's *Waterfalls* and Rauschenberg's *Mud Muse* were fixed in a tangible medium of expression. The mathematical and scientific concept of



"chaos" is an important analogy. In the scientific context, "chaos" signifies a phenomenon that visually appears random but responds to established mathematical limits that vary in outcome depending on even very slight differences in initial conditions.<sup>156</sup> Chaotic processes often are bounded in their outer limits despite our inability to predict exactly what will happen next.<sup>157</sup> In many ways, chaos defines art works like those displaying water descending from the top of a structure or bubbles percolating in a vat. A camera, or even our brains, can capture any moment, but we cannot predict precisely what will happen next.

Given "chaos's" inherent natural variability, the well-defined nature of the mathematical concept, and the ability to capture any particular moment—why not allow an artistic use of bounded randomness, in addition to items that appear stable at the moment of viewing, to be fixed? The underlying artistic intention is just as inventive, creative, and perceptible—maybe more so—as it is in art works generally deemed "stable" despite their changing characteristics. Eliasson's water structures and Rauschenberg's *Mud Muse* should be deemed copyrightable as changing, but bounded, works. They are among the most inventive and unusual works in the history of contemporary art. It would be unacceptable to allow anyone to come along and freely duplicate their work.

These ideas strongly suggest that *Kelley v. Chicago Park District*<sup>158</sup> was incorrectly decided.<sup>159</sup> The Court of Appeals for the Seventh Circuit concluded that the garden *Wildflower Works* was not eligible for copyright protection on authorship and fixation grounds.<sup>160</sup> Designed by Chapman Kelley for Grant Park in Chicago, the garden included carefully selected, seasonal wildflowers

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<sup>156</sup> See generally JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE (2008); see also Jonathan Borwein & Michael Rose, *Explainer: What is Chaos Theory?*, THE CONVERSATION (Nov. 18, 2012, 10:20 PM), <https://theconversation.com/explainer-what-is-chaos-theory-10620> [<https://perma.cc/GX5J-CMT7>].

<sup>157</sup> See *id.*

<sup>158</sup> 635 F.3d 290 (7th Cir. 2011).

<sup>159</sup> Others also have suggested that the court was wrong. See Leung, *supra* note 132132, at 16–18, 20–30; Michelle Chatelain, *Copyright Protection of a Garden: Kelley v. Chicago Park District Holds that Gardens Are Not Artwork Subject to Intellectual Property Protection*, 14 TUL. J. TECH. & INTELL. PROP. 385, 392–94 (2011).

<sup>160</sup> See *Kelley*, 635 F.3d at 306.

planted in distinct and limited plots.<sup>161</sup> The court noted that authorship must entirely be a result of human endeavor and fixation must be authored.<sup>162</sup> The growth of plant life, the court said, was not authored but “planted and cultivated;” and its growth and change over time reduced stability to the point of breaking fixation.<sup>163</sup> While diagrams and plans for the garden were protected, the garden itself was neither a product of an author nor a fixed work.<sup>164</sup> The court’s result barred Kelley from making moral rights claims when the park district tore up the garden to implement a different landscape plan.<sup>165</sup>

The conclusions about both authorship and fixation in *Kelley* were deeply wrong. The basic idea of the garden was not only laid out in “authored” planning documents, but also dutifully maintained within set limits and planting schedules by volunteers working under park authority issued permits.<sup>166</sup> Just as Rauschenberg’s *Mud Muse* and Eliasson’s artificial waterfalls were confined within bounded limits, so too was the garden confined within established planting boundary lines, growing seasons, and color arrangements.<sup>167</sup>

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<sup>161</sup> *Id.* at 293.

<sup>162</sup> *Id.* at 303–04.

<sup>163</sup> *Id.* at 304.

<sup>164</sup> *Id.* at 305.

<sup>165</sup> *Id.* at 306.

<sup>166</sup> *Id.* at 294. The permits eventually expired but maintenance of the installation was allowed to continue without formal permits.

<sup>167</sup> *Id.* at 292–93.



The court's line drawing in *Kelley* was therefore improper. The trial court made analogies to Calder mobiles and Jeff Koons' *Puppy*,<sup>168</sup> pictured above.<sup>169</sup> Unfortunately, both comparisons were deemed inapposite by the Seventh Circuit Court of Appeals:

Though not addressing the requirement of fixation directly, the district court compared Wildflower Works to "[t]he mobiles of Alexander Calder" and "Jeff Koons' 'Puppy,' a 43-foot flowering topiary." These analogies are also inapt. Although the aesthetic effect of a Calder mobile is attributable in part to its subtle movement in response to air currents, the mobile itself is obviously fixed and stable. In "Puppy" the artist assembled a huge metal frame in the shape of a puppy and covered it with thousands of blooming flowers sustained by an irrigation system within the frame. This may be

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<sup>168</sup> *Id.* at 305.

<sup>169</sup> The author took this picture while visiting the Guggenheim Museum Bilbao in June 2006, while the Koons piece was temporarily installed in front of the museum.

sufficient fixation for copyright (we venture no opinion on the question), but Wildflower Works is quite different. It is quintessentially a garden; “Puppy” is not.<sup>170</sup>

Denying the centrality of motion to the widespread appeal of Calder mobiles misses the primary thrust of those works. Motion is intrinsic to Calder’s expressive drive<sup>171</sup> and cannot blithely be dismissed as lacking authorship or fixation. The same is true of Koons’ *Puppy*. Creating a huge, playful figure with irrigated, flowering pots over its entire surface was what gave the piece its aura of friskiness, change, and humor.<sup>172</sup> The flowers were not a minor part of the scheme; they were central to the aesthetic goals. Motion and change are the heart and soul of both the authorship and the sufficiently stable fixation within bounded limits of both the Calder and Koons works, as well as Kelley’s garden.

What about Banksy’s shredding prank? Rather than presenting a constant process of bounded change, the decisive alteration in the original two-dimensional work was sudden, surprising, and totally unexpected.<sup>173</sup> There was nothing subtle or gradual about it. At the conclusion of the bidding, someone from Banksy’s shop used a remote control to activate the shredder buried in the frame of the art, cutting the two-dimensional artwork into strips running about halfway up the piece, and leaving the strips hanging out of the bottom of the frame.<sup>174</sup> This only took a few seconds.<sup>175</sup> *Girl with Balloon* suddenly was transformed before a live audience. Video of the event displays a variety of audience reactions—laughter,

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<sup>170</sup> *Kelley*, 635 F.3d at 305–06 (citations omitted).

<sup>171</sup> See Rachel Corbett, *What Alexander Calder Understood About Joy: America’s Greatest Sculptor Gave Objects a Playful Life of Their Own*, THE ATLANTIC (May 2020), <https://www.theatlantic.com/magazine/archive//05/alexander-calder-jed-perl/609100/Jul> [<https://perma.cc/P2MU-NQ7D>].

<sup>172</sup> See *At the Guggenheim Museum Bilbao, Jeff Koons’ Puppy Gets a Colorful New Coat*, GUGGENHEIM: NEWS (June 21, 2018), <https://www.guggenheim.org/news/bilbao-jeff-koons-puppy> [<https://perma.cc/Z6N5-JS55>].

<sup>173</sup> See Kumparak, *supra* note 136.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

amazement, surprise, horror, and disbelief.<sup>176</sup> The half-shredded work eventually was renamed, authenticated by Banksy's Pest Control website as a new work entitled *Love is in the Bin*, and accepted by the winning auction bidder for the same price she offered for *Girl with Balloon*.<sup>177</sup> There was a virtually dichotomous before and after. The after was dramatically changed in appearance and form from the before. Putting aside the possible tort causes of action that the auction winner may have had for damage to her property,<sup>178</sup> two different art works were at issue. Each was original and fixed. But what about the presence and use of the shredder inside the frame? Was that integral to the original fixation of either or both works? The shredder surely was fixed in a tangible medium—either by thinking of the physical shredder itself or its placement inside the frame. That was so for both the before and the after.

Below is an image of the half-shredded work.<sup>179</sup> After the auction Banksy released a video of the shredder being installed inside the frame of *Girl with Balloon*.<sup>180</sup> An image from the video is below.<sup>181</sup> Another Banksy video showed a test of the system in which an image was completely shredded.<sup>182</sup> It is therefore possible that the device malfunctioned at Sotheby's. Or perhaps the shredder was turned off using a remote control, or maybe never intended to

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<sup>176</sup> *Banksy Painting 'Self-Destructs' After Sotheby's Sale*, CNBC (Oct. 8, 2018, 12:20 PM), <https://www.cnbc.com/video/2018/10/08/banksy-painting-self-destructs-after-sothebys-sale.html> [https://perma.cc/N26N-53JY].

<sup>177</sup> See Scott Reyburn, *Winning Bidder for Shredded Banksy Says She'll Keep It*, N.Y. TIMES (Oct. 11, 2018), <https://www.nytimes.com/2018/10/11/arts/design/winning-bidder-for-shredded-banksy-painting-says-shell-keep-it.html> [https://perma.cc/DGB5-829A].

<sup>178</sup> The standard auction rule is that property ownership shifts at the banging of the gavel at the end of bidding. See U.C.C. § 2-328(2) (AM. LAW INST. & UNIF. LAW COMM'N 2002); Tichy, *supra* note 5.

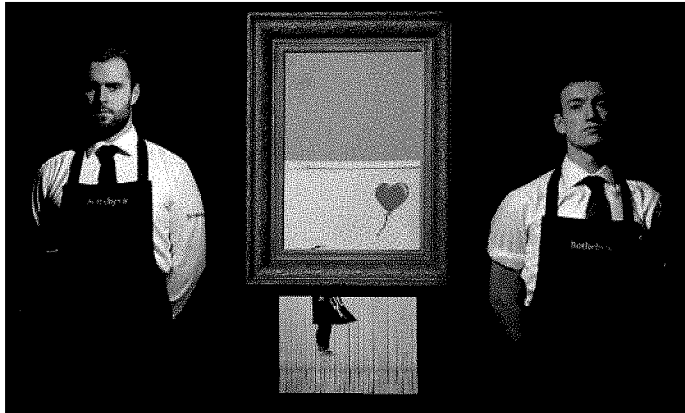
<sup>179</sup> Jonathan Jones, *What Happened Next? How Banksy's Shredder Proved He Is a Serious, Important Artist*, THE GUARDIAN (Dec. 18, 2018, 1:00 PM), <https://www.theguardian.com/news/2018/dec/18/banksy-self-destructing-masterpiece-prank-important-artist> [https://perma.cc/WKS6-THHL].

<sup>180</sup> Bendor Grosvenor, *Shredding Banksy*, ART HIST. NEWS (Oct. 8, 2018), [https://www.arthistorynews.com/articles/5303\\_Shredding\\_Banksy](https://www.arthistorynews.com/articles/5303_Shredding_Banksy) [https://perma.cc/QK Y2-VU34].

<sup>181</sup> *Id.*

<sup>182</sup> *Banksy Reveals He to Shred Entire £1m Girl with Balloon Painting*, SKY NEWS (Oct. 18, 2018, 12:20 PM), <https://news.sky.com/story/banksy-reveals-he-meant-to-shred-entire-1m-girl-with-balloon-painting-11528598> [https://perma.cc/U2XQ-ZB6Q].

fully shred the work in public. If the shredder was turned off, can it be reactivated at a later date?<sup>183</sup> What were the consequences for copyrightability? Certainly, the before and after versions were fixed in a tangible medium of expression. But what was and is the status of the shredder? Was that mechanical device part of an item of protectable “art?”



### III. PICTORIAL, GRAPHIC, AND SCULPTURAL WORKS: SHREDDERS

Copyright terms of art are notoriously flexible and subject to interpretation, even when defined in the Act. This is clearly revealed in the previous discussion of originality and fixation.<sup>184</sup> It is also true

<sup>183</sup> See *id.*

<sup>184</sup> See *supra* Parts I–II.

with copyrightable works styled as “pictorial, graphic, and sculptural works.” On its face, the definition is slippery and puzzling:

“Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.<sup>185</sup>

The definition of a “useful article” also has its ambiguities:

A “useful article” is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a “useful article”.<sup>186</sup>

In combination, these code provisions place Banksy’s shredder in an interesting, indefinite, and perhaps unique, position. While the original *Girl with Balloon* and the post-shredding *Love is in the Bin* compositions are clearly works of fine art, the statutory definitions leave the shredder in an ambiguous place. After insertion in the frame, the shredder certainly lost whatever intrinsic utilitarian function it once had as a device for protecting access to private information, though it does retain at least some of its status as a mechanical device. This may or may not allow it to be treated as part of the art object. If the shredder is part of the “form” of the artistic endeavors, rather than *simply* a “mechanical or utilitarian aspect” of

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<sup>185</sup> 17 U.S.C. § 101.

<sup>186</sup> *Id.*

the works, then it might be considered an aspect of the fine art. But it also may easily be considered an aspect separable from the two-dimensional before and after works, and therefore not part of the protected pictorial creations. It may simply be analogous to a paintbrush—an implement used to create a work rather than an artistic element of the work. It is important to know whether the shredder is part of the artistic work. If the auction winner elects to remove the device from the frame, would that be a mutilation of a work of fine art and therefore a possible moral right violation?<sup>187</sup> If the shredder can be reactivated by use of a remote control, what are the consequences of deactivating any part of the shredder device that might receive a remote signal in the future?

So, what is the shredder? Compare it first to Alexander Calder's *Circus*, constructed between 1926 and 1931 and sometimes on display at the Whitney Museum of Art in New York City, the work's owner.<sup>188</sup> The *Circus* is an elaborate set of circus characters and "acts" that can be animated by hand like children's toys.<sup>189</sup> Even the trapeze artists can be sent swinging.<sup>190</sup> It is much like a dance performance, only the performances involve human interaction. The similarity between Calder's work and choreography, all by itself, strongly suggests that works by the master of mechanical movements should be protected.<sup>191</sup> The art world

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<sup>187</sup> See 17 U.S.C. § 106A.

<sup>188</sup> The image below is from *Calder's Circus* by Alexander Calder, available at WHITNEY MUSEUM OF AM. ART, <https://whitney.org/collection/works/5488> [<https://perma.cc/D3RE-38FX>]. Visit *Alexander Calder, Calder's Circus, 1926-31*, WHITNEY MUSEUM OF AM. ART at <https://www.whitney.org/WatchAndListen/1094> [<https://perma.cc/E5FM-GVKK>] for a video about the work.

<sup>189</sup> A famous video in the Whitney Museum collection captures Calder "playing" with the circus. Whitney Museum of Am. Art, *Alexander Calder performs his "Circus"*, YOUTUBE (Oct. 23, 2008), <https://www.youtube.com/watch?v=t6jwnu8Izy0> [<https://perma.cc/A25C-UBB9>]. However, the circus has rarely been "played" with recently because of the fragility of the sculpture. *Conserving Calder's Circus*, WHITNEY MUSEUM OF AM. ART (May 22, 2013), <https://whitney.org/media/299> [<https://perma.cc/8DJT-PEW9>].

<sup>190</sup> *Alexander Calder performs his "Circus"*, *infra* note 193.

<sup>191</sup> The Copyright Act specifically lists choreographic works as a category of copyrightable subject matter. 17 U.S.C. § 102(a)(4).



certainly considers this work to be an elaborate sculptural work,<sup>192</sup> whether it is sit-ting still or suddenly activated by humans. Indeed, it is considered a major artistic breakthrough, allowing moving objects to be considered as first-rate creative projects. Calder began to fabricate mobiles just after he made the *Circus*.<sup>193</sup> It is an early example of a now large genre known as kinetic art.<sup>194</sup> His mobiles, of course, are in the same category, as are Eliasson's *Waterfalls* and Rauschenberg's mud bubbles.<sup>195</sup>

In each setting, similar questions can be posed about whether the mechanical aspects of the works are part of the protected pictorial, graphic, or sculptural creations. Most of the mechanisms are not separable from the rest of the art. They energize the works. Without them the circus, waterfalls, and mud vat would be wholly different from the items seen by the public. Mechanical devices were intrinsic to the function, aesthetics, and appearance of each work. Removing them would have effectively destroyed the reasons for their creation. Can that be said of the shredder?

Yes and no. It depends on how one defines the original work. Before the shredding occurred, the work appeared as permanent and unchangeable, as prints typically are. Banksy, however, always saw the piece as alterable, if not destructible.<sup>196</sup> Whose perception does copyright law privilege?<sup>197</sup> Given the basic run of ideas suggested to this point in the Article, artistic intention likely controls the

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<sup>192</sup> See Corbett, *supra* note 171. See also Adam Gopnik, *How Alexander Calder Made Art Move*, THE NEW YORKER (Nov. 27, 2017), <https://www.newyorker.com/magazine/2017/12/04/how-alexander-calder-made-art-move> [<https://perma.cc/GYX2-7ZRD>].

<sup>193</sup> See *Calder's Work*, CALDER FOUNDATION, <http://www.calder.org/work/by-life-period/1898-1925> [<https://perma.cc/AP9H-SN2S>].

<sup>194</sup> See, e.g., Jessica Stewart, *Art History: The Evolution of Hypnotic Kinetic Sculptures*, MY MODERN MET (Mar. 27, 2017), <https://mymodernmet.com/kinetic-sculpture-art-history/> [<https://perma.cc/8E3E-M3U6>].

<sup>195</sup> *Id.*

<sup>196</sup> See Grosvenor, *supra*, note 180.

<sup>197</sup> Tort and copyright law may value different intents. The purchaser of the art may be valued by tort law, but not necessarily in copyright law which pays a great deal of attention to artistic intentions.

“definition” of what the work was at its creation.<sup>198</sup> From Banksy’s perspective, he clearly intended to see the work as “kinetic” if it was put on the auction block. It was his pranksterish way of commenting on the economic and cultural impact of the art marketplace of the wealthy. He explicitly said so in the video showing the installation of the device.<sup>199</sup> The shredder was intrinsic in the nature of the work as Banksy conceived it. And, of course, it still may be. For copyright purposes, it is very similar to Duchamp’s *Fountain*, Rauschenberg’s *Canyon*, or his *Mud Muse*. In each of these settings, the artists took utilitarian or non-artistic objects and intentionally integrated them into artistic creations. The works were another way of commenting on temporality and permanence, stability and instability, and life and death.

Banksy here placed himself in the same genre as Cattelan and Fischer. The invisibility of the shredder to the public did not reduce its role in aesthetic judgments Banksy made when he integrated it into the inherent nature of the work. Nor did the invisibility of most of the bubbling system in Rauschenberg’s work. They therefore must be considered as part and parcel of the works in which they sat. And it also must be considered as a critical aspect of the two- or three-dimensional works as defined in the Copyright Act. The shredder is, in fact, both inseparable from Banksy’s compositional efforts and totally lacking in utility. Recall that a work of utility is defined in the Act as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”<sup>200</sup> Once installed, the shredder had no intrinsic utilitarian function nor did it merely portray the work or convey information. Rather, it was an instrument of creativity that operated at the behest of the artist or one of his agents.

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<sup>198</sup> See *supra* Part I. Recall the Hindenburg Disaster disputes in which the book author’s labeling of his book as history cemented its base conceit as historical. See *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 975–76 (2d Cir. 1980).

<sup>199</sup> See Grosvenor, *supra* note 180.

<sup>200</sup> 17 U.S.C. § 101.

## IV. MORAL RIGHTS: BANANAS AND SHREDDERS

The three main works framing the core of this Article by Duchamp, Cattalan, and Banksy included elements of a moral rights problem. Each piece was completely or partially destroyed, or permanently lost to later generations. Art history has its share of tragedy, humor, and good clean fun! After a lengthy dispute over whether *The Fountain* should be shown at the first exhibition of The American Society of Independent Artists in 1917, it was refused entry, set up in the studio of the famous American photographer, Alfred Stieglitz, and photographed.<sup>201</sup> The urinal disappeared not long after the session with Stieglitz and has not been seen since.<sup>202</sup> The exact story of its disappearance is still a mystery.<sup>203</sup> During the 1950s and 1960s, Duchamp authorized the creation of a series of replicas.<sup>204</sup> These replicas are now scattered in important museums around the world.<sup>205</sup> As discussed, Banksy's shredder partially destroyed a work of art. That event created one of the largest, if not the greatest, art uproar of this young century.

Uproars continued apace when Cattelan's *The Comedian* was taken off an exhibition wall and eaten by David Datuna.<sup>206</sup> Only the last event may raise issues under provisions of the Visual Artists Rights Act, America's moral rights statute.<sup>207</sup> *The Fountain* disappeared well before the act was adopted in 1990.<sup>208</sup> The Banksy shredding event occurred at Sotheby's auction house in London,<sup>209</sup>

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<sup>201</sup> *Marcel Duchamp and the Fountain Scandal*, PHILA. MUSEUM OF ART (Mar. 27, 2017), [<https://perma.cc/7A7V-4RYV>].

<sup>202</sup> *Id.*

<sup>203</sup> For a detailed history and analysis of *The Fountain*, see generally Camfield, *supra* note 60. For the definitive biography of Duchamp, see CALVIN TOMKINS, *DUCHAMP: A BIOGRAPHY*, 182–84 (2014). Tomkins' book is an edited and revised version of the original edition published in 1996 by the Museum of Modern Art.

<sup>204</sup> See *The Fascinating Tale of Marcel Duchamp's Fountain*, *supra* note 1.

<sup>205</sup> See *id.* The Tate Modern in London, for example, has one of the replicas. See Marcel Duchamp, *Fountain*, TATE MOD., <https://www.tate.org.uk/art/artworks/duchamp-fountain-t07573> [<https://perma.cc/4GUW-7EFR>].

<sup>206</sup> See Pogrebin, *supra* note 2.

<sup>207</sup> See 17 U.S.C. § 106A.

<sup>208</sup> The Visual Artists Rights Act was adopted by Congress in 1990. Visual Artists Rights Act of 1990, Pub. L. No. 101–650, § 603 603(a) (Dec. 1, 1990), 104 Stat. 5128 (Dec. 1, 1990) (codified at 17 U.S.C. § 106A).

<sup>209</sup> See Kumparak, *supra* note 136.

outside the jurisdiction of United States intellectual property law. Datuna's gustatory destruction of Cattelan's banana, however, occurred at Art Basel in Miami in 2019.<sup>210</sup> But, just to expand the example base, the issues arising in all three cases are considered here despite the inapplicability of the statute in two of the settings.

The moral rights statute has not been a frequent subject of judicial analysis since its adoption in 1990. One of the most important judicial disputes arose over the 2014 demise of the 5Pointz aerosol art complex in Long Island City, Queens.<sup>211</sup> Gerald Wolkoff, the primary owner of the complex, destroyed nearly all of the works at the complex over twenty years after he first allowed street artists to paint at the old industrial site.<sup>212</sup> That event was eerily similar to the disappearance of Duchamp's *Fountain*—here today, gone tomorrow. Shortly after the artists failed to obtain a preliminary injunction barring destruction of the buildings, the owner had virtually all of the art whitewashed in a burst of chutzpah.<sup>213</sup> Doing so aggravated the court and cut off additional efforts to enjoin the demolition. The plaintiffs later won a substantial six and three-quarter million-dollar judgment.<sup>214</sup> The Court of Appeals for the Second Circuit affirmed that result in 2020.<sup>215</sup>

Though Duchamp's urinal and the art at 5Pointz both disappeared from public view, important differences existed. As the litigation made clear, 5Pointz was destroyed over the strenuous objections of the aerosol art community that created the internationally renowned site.<sup>216</sup> But there is a mystery about the

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<sup>210</sup> See Pogrebin, *supra* note 2.

<sup>211</sup> For a lengthy piece on the history of 5Pointz and the litigation over its destruction, see Chused, *supra* note 84.

<sup>212</sup> Alan Feuer, *Graffiti Artists Awarded \$6.7 Million for Destroyed 5Pointz Murals*, N.Y. TIMES (Feb. 12, 2018), <https://www.nytimes.com/2018/02/12/nyregion/5pointz-graffiti-judgment.html> [<https://perma.cc/GM9X-SXMQ>].

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 173 (2d Cir.), *cert. denied*, 2020 WL 5883324 (Oct. 5, 2020)215.

For a detailed discussion, see also an analysis of the oral argument; see also Amanda Ottaway, *Graffiti-Whitewash Appeal Lands with a Thud at 2nd Circuit*, COURTHOUSE NEWS SERVICE (Aug. 30, 2019), <https://www.courthousenews.com/graffiti-whitewash-appeal-lands-with-thud-at-2nd-circuit/> [<https://perma.cc/HGL9-CA2X>].

<sup>216</sup> *Castillo*, 950 F.3d at 164.

motivations of those who caused the disappearance of *The Fountain*.<sup>217</sup> The public does not know what happened to the piece nor whether Duchamp had anything to do with or knowledge of the event. Not only did it occur well before the United States adopted any moral rights provisions, but it is possible that its disappearance was at the behest of or with the consent of Duchamp—a conclusion that would preclude a moral right claim altogether.

A similar problem arises with Banksy's shredder. Though the object was owned by someone else at the time of its partial destruction, the artist was responsible for the modification of the work. The statute provides artists with a cause of action for mutilation or destruction by someone else, but not by themselves.<sup>218</sup> While there are fascinating issues that would arise if the shredder was altered or removed from *Love is in the Bin* by the owner, there were no moral right claims for the events at Sotheby's.

David Datuna, as noted several times, ate Maurizio Cattelan's banana.<sup>219</sup> Was that action covered by the moral right scheme? Was it a mutilation or simply a speeding up of the inevitable? Was it a destructive event or simply a removal of one banana for its inevitable replacement by another? Note that the instruction set for *The Comedian* suggests that the banana be changed every seven to ten days.<sup>220</sup> Was Datuna, in an odd sense, part of the artistic project? Perhaps. Emanuel Perrotin, Cattelan's gallerist, even took one of the bananas off the wall himself and ate it!<sup>221</sup> He is reported as saying, "Maurizio, it's a good banana, I have to say."<sup>222</sup> He went on to claim that in the absence of a certificate of authenticity, anyone removing a banana without paying the price owns nothing except a banana. Destructibility, or at least decay, was part and parcel of the undertaking but an "owner" had to buy the right to tape a banana to a wall in accordance with Cattelan's instructions.

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<sup>217</sup> TOMKINS, *supra* note 203, at 182–84.

<sup>218</sup> See 17 U.S.C. § 106A(a)(3). This, of course, says nothing about the applicability of the tort system.

<sup>219</sup> See Pogrebin, *supra* note 2.

<sup>220</sup> See E-mail from Katherine Wisniewski, *supra* note 85.

<sup>221</sup> Picheta, *supra* note 98.

<sup>222</sup> *Id.*

Conceptual art of this sort creates an especially difficult set of ownership and moral rights problems.<sup>223</sup> The provision most applicable to the Cattelan/Datuna escapade is 17 U.S.C § 106A(a)(3):

(a) Rights of Attribution and Integrity.— [T]he author of a work of visual art<sup>224</sup> . . .

(3) [S]hall have the right—

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.<sup>225</sup>

Did Datuna violate these provisions? Did he mutilate, modify, or destroy *Comedian*? If we take seriously Perrotin's statement about the banana itself not being a work of art until a price is paid for a certificate of authenticity, then Datuna simply enjoyed a nice repast. He didn't destroy anything of significance. If, however, we consider every instance of Cattelan's *Comedian* installed in accordance with the certificate of authenticity and the instructions

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<sup>223</sup> For a lengthy review of the copyright and moral rights issues that arise with the works of Sol LeWitt, see generally Chused, "*Temporary*" *Conceptual Art*, *supra* note 84.

<sup>224</sup> The Act defines the term "work of visual art" in a way that severely limits the coverage of American moral right law. 17 U.S.C. § 101 provides:

A "work of visual art" is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

<sup>225</sup> 17 U.S.C. § 106A(a)(3).

conveyed as part of each sale of the work, then Datuna did destroy a work of visual art.

As noted in Part II(A), the installed version of Cattelan's *The Comedian* was a derivative work in its own right.<sup>226</sup> In reality, each installed version of the work is likely to be different from any other in some way—perhaps another wall, a new banana, a distinct spool of tape, a slightly altered angle on the wall, a unique banana color, an unpredictable speed of decay, or a unique atmosphere with new lighting, wall color, nearby works, gallery or museum, or moment when a rotten banana is exchanged for a fresh one. But most importantly for purposes of this Article, the fact that the banana constantly decays does not remove the possibility that taking down the banana and eating it is a destructive or mutilating act. Since one interesting feature of this particular work is witnessing its decay, interrupting that process is a destructive intervention in the artistic process on display. It is virtually the same as destroying a work in a temporary installation made of fairly permanent materials before the projected closing date for the show. In both cases the temporality of the art is dramatically interrupted. Indeed, this was one of the major holdings in the 5Pointz litigation.<sup>227</sup> The sudden destruction of the work, even though it all was destined to be destroyed at some point in the future, was still deemed a malicious interference with moral rights. Here, Datuna interrupted the expected seven- to ten-day life of the banana and destroyed the temporal intentions of Cattelan.

While this Article was in draft stage, the Museum of Modern Art in New York City temporarily showed photographs by Dorothea Lange.<sup>228</sup> If someone walked in and smashed one of the pictures, that would surely be an act of destruction despite the fact that the show was temporary. If the same museum held a temporary exhibition of rotting bananas put up and maintained by Cattelan and someone took and ate one of the pieces of fruit, it would for moral right purposes be no different from the destruction of a Lange image.

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<sup>226</sup> See *supra* notes 111–114 and accompanying text.193

<sup>227</sup> *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 167–69 (2d Cir.), *cert. denied*, 2020 WL 5883324 (Oct. 5, 2020)215.

<sup>228</sup> See Dorothea Lange, *Pictures and Words*, in MUSEUM OF MOD. ART, <https://www.moma.org/calendar/exhibitions/5079> [<https://perma.cc/B774-TREQ>].

And that reality would not be altered by the ability to make another copy of the photograph if the original negative still exists.<sup>229</sup>

This conclusion about *The Comedian*, however, does not answer the moral rights problems associated with Banksy's shredder. If I am correct that the shredder must be considered part and parcel of the before and after works by Banksy, removing or altering it risks a moral rights claim. That move, of course, would not be made by Banksy but by the new owner of the half-shredded work. Similarly, if the new owner elected to restore the work to its original appearance, that also might risk a moral rights claim. Since the shredder was an intrinsic part of Banksy's intention to alter *Girl with Balloon*, making that intention impossible to put into effect again may create a problem. If it was Banksy's intention to only partially shred his work at the Sotheby's auction and finish the job if the piece ever went up for auction again, then removing the shredder significantly alters the work itself.

These questions, of course, are deeply ironic, if not perverse. The owner of the new version, *Love is in the Bin*, may simply want to protect her investment from total destruction, even though total destruction may be an eager glimmer in Banksy's eye if the piece is again put up for auction. One can assume that if anyone with a modicum of intelligence wished to bid on the piece now, they surely would wish to get assurance that the shredder cannot continue its destructive course. This would require that the back of the piece be opened up for viewing, that the shredder be inspected by an expert, and that it be deactivated or removed if necessary.

It certainly is bizarre to conclude that removing the possibility of destruction is considered a mutilation or destruction of the underlying work itself. This is what generates the major controversy. What should a court do if confronted with a dispute between a plaintiff's plea to remove the possibility of a future damage to property tort claim and a defendant artist's plea that to do so violates the moral right provisions of the Copyright Act? How should that

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<sup>229</sup> This, of course, does not answer questions about the reduction in reputation or the recognized stature of a work as required in various parts of 17 U.S.C. § 106A(a)(3). Nor does it refer to the moral rights provisions limiting protection of photographs to those made for purposes of exhibition in less than 200 copies.



balance be worked out? It would be odd if the plaintiff is not allowed to preclude destruction of a work she owns. But it would also be odd if an artist was barred from pursuing a claim that the owner was planning to mutilate or destroy a work of fine art.

There is no obvious answer to this dilemma. Perhaps some sort of compromise is the best we can hope for. From the film of the shredding event posted by Banksy, it appears that the shredder was activated by a remote control. Using such a device requires the existence of some sort of signal receiving system in the artwork. If there is a small hole in the frame for passage of an infrared signal, why not allow the owner of the work to tape it over or plug the hole with an easily removable substance? Or, if the device requires a battery to remain active, what if the battery was simply removed? Or what if one wire was removed from a terminal or snipped? Would any of these be properly viewed as a mutilation or destruction? Or would it be a disturbance of Banksy's intentions and therefore an act of mutilation? Perhaps it is best that this issue about the culture of art and law be left open for further thought.

### CONCLUSION

Art is in a constant state of flux. Statutory language, however, does not change very frequently. Sometimes it lasts for decades. The Copyright Act of 1909 was not significantly rewritten until 1976, more than forty years ago.<sup>230</sup> It was during that time period that many major shifts occurred in the nature and content of work widely recognized as making important changes in the nature of art.

Accommodating such changes requires at least three things. First, the language of statutes must contain enough "wiggle room" to give judges some flexibility in how they approach new problems as they arise. Second, there must be active judges who understand the art world and think deeply about how statutory language may be used to address new developments. And, finally, it is critical that judges fully absorb the now classic contention of Justice Oliver Wendell Holmes that courts are improper forums for resolving

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<sup>230</sup> For a summary of the Copyright Act's history, see JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY, 5TH ED. 28–29 (2020).

debates about the quality and importance of new artistic endeavors. That must be left to society at large.<sup>231</sup> Considered together these three receptors for intelligent use of the Copyright Act are the crux of this Article.

It is not important whether readers fully agree with the premises. The only critical matter is that readers are open minded about the flexibility of words in the existing statute, willing to educate thoughtful judges about ways they can consider new uses of old words, and prepared to think about the ways in which artistic movements may be integrated into existing legal system in non-traumatic ways. Hopefully, this Article produces such results.

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<sup>231</sup> See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252–53 (1903). There, Holmes noted that:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value-it would be bold to say that they have not an aesthetic and educational value-and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights.

*Id.*